

UNIVERSITY OF CAPE TOWN
SCHOOL OF ADVANCED LEGAL STUDIES



**AN ASSESSMENT OF THE SUITABILITY OF
THE CRIMINAL CARTEL OFFENCE IN SOUTH
AFRICAN COMPETITION LAW**

MASTER OF LAWS IN COMMERCIAL LAW

Mini-dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Masters of Laws in Commercial Law in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses

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ABSTRACT

Section 73A of the Competition Amendment Act 1 of 2009 which will be inserted into the Competition Act 89 of 1998, will hold directors/executives criminally liable for infringing s4(1)(b) of the Competition Act. Section 4(1)(b) specifically prohibits firms from engaging in price-fixing, collusive tendering, market allocation which are regarded as egregious forms of activity. The underlying justification for the cartel offence is the protection of consumer welfare and on the other hand to address the under-deterrent nature of monetary administrative penalties in the fight against cartels. In its current form, s73A has several weaknesses which will negatively impact competition enforcement; particularly the leniency policy which is the Commission's most effective weapon against cartelisation.

The emergence of follow-on damages litigation as a legal remedy and class actions as a procedural mechanism in the broad class action, have paved the way for private competition enforcement as a more effective deterrent. The lack of a statutory regulatory framework compelled the courts to develop the common law regarding follow-on damages litigation and class actions. Although the exercise has highlighted the challenges associated with the lack of judicial guidance in developing directives, it has indicated that private competition enforcement is a pragmatic solution for cartelisation.

CHAPTER 1

Introduction

It has been over a decade since the promulgation of the Competition Act 89 of 1998 (“the Act”) and enormous strides have been made in the advancement of competition law and enforcement in South Africa. The current competition policy is indicative of a progressive move towards achieving what the Act so boldly proclaims in the preamble, as greater ownership of the economy by a greater number of South Africans.¹ Therefore, the Act must strike a precarious balance; its reach must be felt by the poorest within the country, while taking cognisance of the overarching mandate to promote and protect the market economy. The essence of competition law has aptly been described as follows:

The central purpose of competition law is the protection and promotion of a competitive market economy. In competitive markets, firms prosper (and indeed survive) by surpassing their rivals in identifying and serving consumer needs, with the result that resources are put to their best use leading to the provision of an appropriate amount of goods or services (allocative efficiency) at the lowest cost (productive efficiency).²

Competition law thus seeks to foster a perfect market by monitoring and controlling anti-competitive behaviour. In a monopoly situation, allocative inefficiency prevails because monopolists reduce production, increase product prices and distort the overall balance in a so-called perfect market.³ Consequentially, consumers are deprived of affordable, quality goods and services at competitive market prices.⁴ Therefore, competition law is rooted in ensuring that “social welfare is maximised in conditions of perfect competition”⁵ through a combination of allocative and productive efficiency. In order to maximise social welfare or consumer welfare (which is the concern of this discussion) the market must facilitate perfect competition. Competition law is thus predicated on the attainment of the perfect market which enables all business entities to compete equally.

¹ Preamble of the Competition Act 89 of 1998.

² Luke Kelly ‘Introduction of a “Cartel Offence” into South African law’(2010) 21 *Stellenbosch Law Review* 321 at 322.

³ Richard Whish, David Bailey, *Competition Law* 7ed (2012) 6.

⁴ Ibid.

⁵ Whish & Bailey op cit (n3) 2.

South Africa's market economy is characterised by concentrated markets, high entry level barriers and the production of mostly homogenous goods.⁶ The existence of concentrated markets contributes to anti-competitive behaviour due to firms maintaining too much market power. Concentrated markets are prone to undermining consumer welfare due to unjustified increases in product prices, production of poor quality products, thwarting innovation and most importantly, depriving consumers of choice.⁷

A high prevalence of this behaviour is found in South Africa where cartels have been active in markets that provide basic necessities such as milk⁸ and bread.⁹ As a result, it has become increasingly difficult to ignore the growing number of cartels and the proclivity towards recidivist behaviour by firms such as South African Airways,¹⁰ which have previously been fined by the Competition Tribunal. It is my contention that the current public competition enforcement system is flawed and at times facilitates an environment that is prone to collusive conduct. The administrative penalties imposed to anticompetitive firms are under deterrent and have become part and parcel of the cost of doing business.¹¹ In response to the challenges associated with cartel enforcement, the criminalisation of cartel conduct was tabled as a suitable remedy.

The Competition Amendment Act 1 of 2009 ("Amendment Act") will introduce a cartel offence. Section 73A¹² will specifically hold directors of companies who are found guilty of cartel conduct, criminally liable. A detailed consideration of the cartel offence will be discussed in chapters 4 and 5. The comparative analysis between the United States of America and the United Kingdom will reveal that although the cartel offence is a necessary measure, it has been

⁶ Reena das Nair, Liberty Mncube 'The role of information exchange in facilitating collusion – insights from selected cases' (2009) South African Competition Commission's Third Annual Competition Conference, 3 September 2009 at 1, available at <http://www.compcom.co.za/presentations-third-annual-competition-conference>, accessed on 14 March 2013.

⁷ s 1(xi)-A firm includes a person, partnership or a trust.

⁸ See Tribunal Consent Order in the matter between the *Competition Commission and Lancewood Cheese*. Tribunal Case No: 103/CR/Dec06. Lancewood Cheese paid an administrative penalty of R100 000.00 for its involvement in a milk cartel.

⁹ See the Tribunal Consent Order in the matter between the *Competition Commission and Foodcorp Pty (Ltd)* Case No: 50/CR/May08. Foodcorp paid R45 406 359, 82 as an administrative penalty for its involvement in a bread cartel.

¹⁰ *Competition Commission v South African Airways (Pty) Ltd* case no. 18/CR/Mar01.

¹¹ Kelly op cit (n2) at 323.

¹² GG 32533 of 2009-09-28.

prematurely introduced within the South African milieu. More specifically, the system has yet to create a harmonised role between the competition authorities and the National Prosecuting Authority (“NPA”) which as will be discussed has created an overlap of functions and is likely to cause discord.¹³

The most pressing concern is the negative impact the cartel offence will have on the Corporate Leniency Policy (“leniency policy”) the most fundamental tool in prosecuting cartels as discussed in chapter 3.¹⁴ The leniency policy grants immunity from prosecution to any member of a cartel, in exchange for information regarding an on-going cartel.¹⁵ The leniency policy was developed as a guideline to be used by the Commission.¹⁶ The immunity is conditional and based on the outcome of adjudication by the Competition Tribunal or the Competition Appeal Court.¹⁷ Nonetheless, there is a clear incentive to “blow the whistle” on an existing cartel in exchange for immunity. It must be noted that the immunity granted by the leniency policy, does not extend to criminal liability which the cartel offence seeks to impute on directors found guilty of anti-competitive conduct.¹⁸ It is therefore a natural consequence that cartelists will not be willing to make use of the leniency policy, if it would translate into criminal liability for their actions. This will drive cartel members back into secrecy. Consequentially, the cartel offence will undermine the effectiveness of the leniency policy which has been the most significant tool for public cartel enforcement.¹⁹

It is my contention that South African competition law would be better served with a framework that reinforced private cartel enforcement. I submit that private cartel enforcement will create a greater deterrent effect than criminal sanctions. The rise in cartel conduct over the years as discussed above has been detrimental towards consumers who are subjected to inordinate prices for goods and services. The current legislative framework provides that if a complainant wishes to

¹³ s73A(4).

¹⁴ GG 31064 of 2008-05-23.

¹⁵ Chantal Lavoie ‘South Africa’s Corporate Leniency Policy: A Five-Year Review’, Presented at the third annual competition conference, 4 September 2009 at 2, *available at* <http://www.compcom.co.za/presentations-third-annual-competition-conference>, accessed on 12 March 2013.

¹⁶ s79 of the Competition Act.

¹⁷ Corporate Leniency Policy para 5.6, *available at* <http://www.compcom.co.za/assets/Uploads/CLP-public-version-12052008.pdf>, accessed on 27 February 2013.

¹⁸ s73A (4) of the Competition Amendment Act 1 of 2009.

¹⁹ Competition Commission ‘Competition Commission Annual Report 2011/2012’ 30 July 2012, *available at* <http://www.compcom.co.za/assets/Publications/Annual-Reports/COMPETITION-COMMISSION-AR11-12-LOW-RESWITH-HYPERLINKS.pdf>, accessed on 27 February 2013.

bring a claim against a firm for a prohibited practice, the claim can only be implemented once the courts find the firm guilty of a prohibited practice.²⁰ Once a firm's guilt has been proclaimed in terms of a s65 certificate, the claimant may pursue what is referred to as follow-on damages litigation.

Private competition enforcement against cartels is likely to take the form of class actions. Class actions are not a novel experience in South Africa, but they would be new within the context of competition law. Access to justice is an issue that has taken the fore over the years and class actions are a more inclusive procedural mechanism available to consumers. Most importantly, due to the overbearing cost of litigation, the contingency fees and the use of the Legal Aid Board would ease the financial burden of litigation. The recently certified class action, initiated by a class of consumers and a class of bread distributors against the bread cartel, is the first private litigation class action to go through the courts. If the class action is successful it will create a trajectory for other class actions to follow. Chapter 6 will therefore, grapple with the issues surrounding the certification of class actions and most importantly illustrate the merits of private cartel enforcement.

²⁰ s67 of the Competition Act.

CHAPTER 2

ENFORCEMENT AGAINST CARTELS: THE JOURNEY SO FAR

2.1 Historical Overview of cartels

A cartel is defined as ‘an agreement or concerted practice among competing firms or a decision by an association of firms, to coordinate their competitive behaviour, through conduct such as price fixing, division or allocation of markets, and/or collusive tendering.’²¹ The nature of cartel conduct can range from an actual agreement between firms or some form of co-operative coordination. The result is that the firm should have committed one of the prohibited practices mentioned above. Cartels by their very nature are based on inimical behaviour. They are a form of monopolist that seeks to unilaterally control market power by undermining the fundamental concept of a free market economy. By exercising conflicting activities that undermine consumer welfare and distort the market, cartels are born and continue to flourish.

The economic history of South Africa has played a role in sustaining cartels. It is widely known that some of the basic industries such as postal services, telecommunications, electricity were (and are still) owned by the government. Therefore, to secure their economic stability, the government maintained a protectionist agenda over these industries through the use of cartels.²² Monopolies and Cartels were thus used by the state as a mechanism to protect sectors which were vulnerable and crucial to economic prosperity.²³ They existed within specific parameters and were governed by various government institutions.²⁴ The government in particular, has been involved in providing subsidies to industries such as steel, agriculture and fuel; relatively strategic industries which contributed to economic growth during that time.²⁵

²¹ Supra (n17) para 5.1.

²² Department of Trade and Industry Pretoria ‘Proposed Guidelines for Competition Policy – A framework for Competition, Competitiveness and Development’ 27 November 1997 para 3, available at <http://www.compcom.co.za/assets/Files/ProposedGuidelinesforCompetitionPolicy.htm>, accessed on 27 February 2013.

²³ Ibid.

²⁴ Supra (n22) para 3.

²⁵ Nompucuko Nontombana, Itumeleng Lesofe ‘Do cartelists change behaviour post-investigations’ Fourth Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, 2 September 2010 at 3, available at <http://www.compcom.co.za/fourth-competition-law-conference/>, accessed on 12 March 2013.

Cartels on a global spectrum have been in existence for a relatively lengthy period of time and can be traced back to the second quarter of the nineteenth century.²⁶ Historically speaking, cartels enjoyed a positive status in other jurisdictions. In Germany cartels were the product of economic uncertainty.²⁷ Faced with competition from Britain and a desire to expand territorially, Germany looked to cartels as a strategy to protect its economy.²⁸ Cartels became a strategic move in facilitating economic growth and power.²⁹ Estimates illustrate that there were only 4 cartels in Germany in 1865 and the numbers increased to 1,000 by the end of the World War I, due to the industrialisation of Germany during the nineteenth century.³⁰

To ensure economic prosperity after the depression that lasted from 1873-1896, Germany undertook a protectionist agenda.³¹ Concepts such as “consumer choice” and “economic freedom” were non-existent; ‘consumers were largely identified as workers whose interests were represented by the growing trade union movements.’³² As a result, the need for a regulatory framework was absent, a sentiment the German legislature later regretted. It was only in the early twentieth century that the need for competition emerged, evidenced by inflated prices and growing public concern.³³ The cartels that had built economic power had now become the root cause of economic instability. It was from this era that a regulatory framework developed and competition enforcement re-emerged as an economic necessity in Germany. The impetus to create a free economy, gave rise to the European commission’s cartel policy.

The South African Government was equally having difficulties when some of the protected industries were scrutinised for anti-competitive practices that proved detrimental to economic growth. A legislative framework, that would adequately address anti-competitive conduct, needed to be developed with quite some urgency.³⁴

²⁶ Lee McGowan *The Antitrust Revolution in Europe, Exploring the European Commission’s Cartel Policy* (2010) 46.

²⁷ McGowan op cit (n26) 47.

²⁸ Ibid.

²⁹ Ibid.

³⁰ McGowan op cit (n26) 48.

³¹ McGowan op cit (n26) 49.

³² McGowan op cit (n26) 52.

³³ McGowan op cit (n26) 53.

³⁴ Supra (n22) para 3.2.

The Regulation of Monopolistic Conditions Act³⁵ was the first piece of legislation that addressed monopolistic conditions within South Africa. When the Board of Trade and Industries (which later became the Competition Commission), was formulated over two decades ago, its goal was to tackle monopolistic structural conditions and anti-competitive conduct within the South African economy.³⁶

During the early years of the Board of Trade and Industries a majority of the cases investigated revealed that monopolistic conditions were prevalent in basic necessities such as groceries, books, cigarettes and newspapers.³⁷ However, not all monopolies were regarded as negative, some monopolistic conditions were necessary. This position was equally endorsed by the German government who undertook a protectionist agenda by allowing certain cartels to exist in their most vulnerable sectors of the economy as previously discussed. The board however, made it clear that they did not accept monopolistic practices such as price agreements, fixed trade discounts, resale price maintenance and exclusive deals made with suppliers and dealers.³⁸ Therefore, the Maintenance and Promotion of Competition Act³⁹ was promulgated with the hopes of addressing the weaknesses of The Regulation of Monopolistic Conditions Act.

The Maintenance and Promotion of Competition Act failed to prohibit anti-competitive conduct; it was frequently challenged on substantive and technical grounds.⁴⁰ This undermined the effectiveness of the prohibitions and failed to address the monopolistic conditions that undermined the market. It was amidst these challenges that the current Competition Act was developed.⁴¹

2.2 The Current Legislative Approach

The Commission is the driving force in combating anti-competitive conduct. It is the public statutory body entrusted with investigating, controlling and evaluating restrictive business practices in the South African market.⁴² It enjoys broad

³⁵ The Regulation of Monopolistic Conditions Act 24 of 1955.

³⁶ Supra (n22) para 3.2.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Act of 1979.

⁴⁰ Ibid.

⁴¹ Gertrude Makhaya, Wendy Mkwanzani & Simon Roberts 'How should young institutions approach competition enforcement? Reflections on South Africa's experience' (2012) 19 *South African Journal of International Affairs* 43 at 45.

⁴² See www.compcom.co.za, accessed on 1 July 2013.

investigative powers that facilitate the prosecution of cartels.⁴³ Their powers specifically enable them to interrogate directors, employees and any other individuals involved/related to the prohibited conduct.⁴⁴ Once the Commission has completed its investigation it may refer the matter to the Competition Tribunal.⁴⁵ The Competition Tribunal is the statutory adjudicative body which determines whether the conduct of a firm is prohibited in terms of Chapter 2 of the Act.⁴⁶ If it is not, the Commission issues a notice of non-referral to the complainant.⁴⁷

The Commission is equipped with three main tools to combat cartelisation; s4(1)(b) provision, the leniency policy and administrative penalties. This discussion will focus on s4(1)(b) and highlight some of the challenges faced in its interpretation and implementation. An examination of the leniency policy and administrative penalties will follow in Chapter 3.

The Competition Tribunal determines whether a firm is guilty of prohibited practice in terms of s4(1)(b). When a firm is found guilty of a prohibited practice, it imposes an administrative penalty or additionally, any other order it deems fit.⁴⁸

Section 4(1)(b) of the Act specifically prohibits the following:

An agreement between, or a concerted practice by, firms or a decision by an association of firms' between parties in a horizontal relationship and if it involves any of the following restrictive horizontal practices:

- (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
- (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- (iii) collusive tendering.

Section 4(1)(b) forms the apex in establishing whether a firm is guilty of cartel conduct. The tribunal/courts are mandated to take a step-by-step inquiry to determine whether the conduct identified meets the requirements of the provision. In order to understand the framework in which s4(1)(b) operates, the definitional components of s4(1)(b) will be canvassed below.

The definition above begins by highlighting three different forms of co-operation; an agreement, a concerted practice or a decision by an association of firms. The Act was drafted to separate collusive or coordinated acts and acts

⁴³ s46-s49A of the Competition Act.

⁴⁴ s49A.

⁴⁵ s50(2)(b).

⁴⁶ s50(2)(b).

⁴⁷ s50(2)(b).

⁴⁸ s58(1)(iii).

undertaken by individuals for their own benefit.⁴⁹ Therefore, the emphasis on these distinctions is predicated on the necessity of determining which firms partake in prohibited practices and to avoid implicating firms which are not inherently collusive.

An agreement and a concerted practice are mutually exclusive terms. An agreement is defined in the Act as a ‘practice, [which] includes a contract, [an] arrangement or [an] understanding, whether or not legally enforceable.’⁵⁰ A concerted practice on the other hand [refers to] co-operative, or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.⁵¹ Therefore, cartel conduct can range from an express agreement between firms to some form of co-operative coordination. The Act does not define what a competitor is but, it is safe to conclude that it refers to firms that compete and operate in the same line of business.⁵² A restrictive horizontal practice can be described as:

[A]rchetypal anti-competitive acts which encompass the acquisitions and abuse of market power through the co-operative acts of competitors. They therefore occur where competitors co-operate instead of competing, enabling a number of firms to act like a monopolist.⁵³

It must be noted that because cartel conduct is regarded as the most egregious form of anti-competitive conduct, it is a *per se* prohibition. A *per se* prohibition refers to conduct that is outrightly prohibited. The principle, which derives from the United States, is referred to as a *per se* prohibition because ‘experience has shown that they mostly have serious anti-competitive effects and can almost never have redeeming features.’⁵⁴ The mere existence of the conduct is sufficient to constitute a contravention of s4(1)(b). It does not require one to establish that it is not anti-competitive nor can it be justified by the guilty parties.

Once, the above definitional components are met, one needs to determine whether the firm is guilty of price-fixing, market allocation or collusive tendering. A finding of guilt is subject to the evidence acquired through the investigation launched by the Commission. Once their investigations are completed, the matter is referred to the Competition Tribunal for adjudication.

⁴⁹ Philip Sutherland, Katharine Kemp *Competition Law of South Africa* (2000) 5-9.

⁵⁰ s1(ii) of the Competition Act.

⁵¹ Ibid.

⁵² *American Soda Ash Corp v Competition Commission* 12/CAC/Dec0 at 24.

⁵³ J Neethling *Unlawful Competition* 2ed (2008) 29.

⁵⁴ Ibid at 31.

2.2.1 Section 4 (1)(b)

(i) Price Fixing

‘Price fixing is inimical to economic competition, and has no place in a sound economy.’⁵⁵ It goes against a fundamental competition principle of promoting a free market economy. Therefore, because price fixing by its very nature distorts the market by manipulating it, it is automatically regarded as prohibited conduct.⁵⁶ Consequentially, it is only necessary to show that there was collusion to fix prices and nothing more.⁵⁷

The Act envisions two forms of price fixing; direct and indirect. Direct price fixing can take the form of an express agreement on prices to be charged on various products and specific discounts to be offered to customers. Indirect price fixing refers to the indirect coordination of prices.⁵⁸ In *American Soda Ash Corp v Competition Commission*⁵⁹ the court held that the creation of an alter ego of a competitor is a form of indirect price fixing. The alter ego of the firm undertook certain functions of the main business entity.⁶⁰ If upon scrutinizing this alter ego, it is discovered that there is price-fixing, then the competitor would not be able to maintain the façade any longer.⁶¹ The common thread of both forms of price fixing is that the information exchanged between cartel members contributes to direct/indirect price fixing. Today, associations and boards act as the disseminators of information regarding various markets. The frequent exchange of information through pricing plans, costs, customer details, and market demand, directly contributes to competitors colluding.⁶²

In 2009, the Commission investigated the petrochemicals industry for price fixing and incidentally information exchange took the fore of the investigation.⁶³ Sasol Ltd⁶⁴ was one of the firms investigated for being in a restricted horizontal relationship that resulted in prices being fixed for the sale of base bitumen and

⁵⁵ Sutherland & Kemp op cit (n49) 5-20.

⁵⁶ *National Society of Professional Engineers v United States* 435 US 679 (1978) at 692.

⁵⁷ Sutherland & Kemp op cit (n49) 5-45.

⁵⁸ Ibid at 5-47.

⁵⁹ *American Soda Ash* supra (n52) at 53.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Whish op cit (n3) 5.

⁶³ *Competition Commission v Southern African Bitumen Association* 06/CR/MAR10.

⁶⁴ Sasol was in a restrictive horizontal relationship with Chevron SA (Pty) Ltd, Engen Limited, Shell SA (Pty) Ltd, Total SA (Pty) Ltd, Masana Petroleum Solutions (Pty) Ltd and Tosas Pty (Ltd).

bituminous products.⁶⁵ The petrochemicals companies had adopted a pricing mechanism based on the Wholesale List Setting Price. The List was applied by oil companies when they enjoyed an exemption until 2000 when the exemption was withdrawn.⁶⁶ The exemption (a remnant of the protectionist agenda) allowed companies to jointly calculate prices for bitumen based on the list.⁶⁷ The pricing index which was applied by the companies was facilitated by the South African Bitumen Industry Association.⁶⁸

The petrochemicals companies contained their price-fixing through monthly exchanges of information through the South African Petroleum Industry Association. The information exchanged whether aggregated or not, has the likelihood of being collusive/anti-competitive if the exchange is based on private communications associated with prices and plans.⁶⁹ The petrochemicals industry was found guilty of price fixing and the South African Bitumen Industry Association confirmed its role in the discussions which led to price fixing.⁷⁰

The case brought to light the prevalence and the effect of information exchange. The current competition framework does not specifically address information exchange, but it could be regarded as a form of indirect price fixing.⁷¹ Information exchange leads to indirect price fixing by enabling greater transparency between the pricing practices of firms. The unpredictability of the market (which is fundamental in maintaining a competitive environment) is removed. Therefore in an environment where there are very few competitors and there is production of homogenous products, indirect price fixing is bound to occur as a consequence of information exchange. Perhaps information exchange should be regarded as an anti-competitive practice on its own, if it can be illustrated that it directly contributes to anti-competitive practices.

(ii) Market Allocation

Market allocation refers to the division of markets between competitors.⁷² In practice, firms allocate specific markets to competitors or potential competitors and

⁶⁵ *Commission v Bitumen* supra (n63) para 2.2.

⁶⁶ *Ibid* para 2.4.4.

⁶⁷ *Ibid*.

⁶⁸ *Ibid* para 2.4.3.

⁶⁹ *Das Nair & Mncube* op cit (n6) at 14.

⁷⁰ *Commission v Bitumen* supra (n63) at 4.1.

⁷¹ *Das Nair & Mncube* op cit (n6) at 10.

⁷² *Malefo v StreetPole Ads (SA) (Pty) Ltd* 35/IR/May05.

these competitors are able to exercise market control in their designated markets. However, it is not mandatory to establish market control to establish that market allocation has occurred. One only needs to illustrate that there has been a *division* of the market and it is automatically presumed to be harmful.⁷³

A relatively controversial case that South African competition law drew from with regard to this aspect, is *United States v Topco Association*.⁷⁴ A group of grocers had sought to promote products under the Topco brand name.⁷⁵ As part of the agreement they were required to sell Topco products in their allocated area and they could still compete with other non-Topco products.⁷⁶ The objective of the agreement was to allow for the promotion of Topco products in a certain area, without the imposition of other Topco product sellers interfering in that market.⁷⁷ The court found that this form of market allocation was a *per se* prohibition despite that it was pro-competitive.⁷⁸

The judgment was criticized for being too stringent because it failed to consider the underlying purpose of the conduct of the parties involved.⁷⁹ It was suggested that the courts should examine cases of this nature with more flexibility and assess the true effects of the parties conduct to determine whether it is anti-competitive.⁸⁰ If the stringent approach adopted by the court in *Topco* is maintained it may actually push firms into cartel activity because economic development remains unsupported. It is an approach that can be considered to prevent the undermining of pro-competitive strategies undertaken by firms to increase economic productivity.

However, the greatest advantage of *per se* prohibitions is that it reduces the evidentiary burden on Competition Authorities. For resource stricken jurisdictions, conducting an economic analysis to prove anti-competitive conduct is difficult. It is likely to create a tipped scale in favour of cartelists due to their ability to afford a highly specialised legal team and experts. Therefore, it is a slippery slope but one which is beyond the scope of this paper.

⁷³ Sutherland & Kemp op cit (n49) at 5-54.

⁷⁴ *United States v Topco Association* 405 US 59 (1972).

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Sutherland & Kemp op cit (n49) at 5-55.

⁸⁰ Ibid.

(iii) Collusive Tendering

Collusive tendering or bid rigging as it is commonly referred to in the United States of America, occurs when firms agree on the conditions for tendering or supplying of a specific commodity in response to a call for tenders.⁸¹ Collusive tendering can be described as another form of market allocation.⁸² It is manifested in different forms and can also lead to price fixing. It is regarded as a *per se* prohibition; it contributes to the distortion of the market and undermines competition. There are four main methods of collusive tendering:⁸³

- i. **Bid suppression:** certain companies agree to refrain or withdraw from the tender procedure.
- ii. **Complementary bidding:** certain members of the cartel agree to submit high bids to give an appearance of competition.
- iii. **Bid rotation:** all the members submit tenders, but take turns to be the lowest and winning tender.
- iv. **Sub-contracting:** the winning company spreads some of the spoils, by sub-contracting part of the work to losing bidders.

2.3 Conclusion

A collective assessment of s4(1)(b) and its application indicates that there are some notable challenges faced in its interpretation. The historical account discussed above indicates the importance of s4(1)(b) and the critical role it plays in facilitating a competitive environment. The existence of a highly concentrated market, high entry level barriers and relatively homogenous products are the main characteristics of South Africa's market. It is this structural component which contributes to the ease with which firms collude. The importation of information exchange into the legislative framework as a prohibited practice could contribute to reinforcing the reach of s4(1)(b). The challenges presented, represent the *naturalia* of a developing jurisprudence and it would suffice to say that the implementation of s4(1)(b) has made significant strides in addressing cartel conduct thus far.

⁸¹ *SA Metal & Machinery Co v Cape Town Iron & Steel Works* 1997 (1) SA 319 (A) 324.

⁸² Sutherland & Kemp op cit (n49) at 5-59.

⁸³ The Official Newsletter of the Competition Commission 'Competition News' 1 September 2001 at 2, available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Sept-01-Newsletter.pdf>, accessed on 12 March 2013.

CHAPTER 3

THE CORPORATE LENIENCY POLICY

The enforcement against cartels has assumed a more globalized tone in recent years. The common thread between various jurisdictions is the leniency policy; adopted as the successful ‘carrot-and-stick strategy’ in public cartel enforcement.⁸⁴ The policy creates a highly tempting deal to cartelists by offering them immunity from the one thing they fear; prosecution. To begin to understand the leniency policy an examination of its fundamental tenants will be canvassed below.

3.1 The Theory of leniency

In economic and sociological circles, cartels can be loosely understood as an unstable organization.⁸⁵ The *modus operandi* of this organization is not based on a memorandum of incorporation or articles of association but, on what is colloquially termed as a truce.⁸⁶ When firms collude they cooperate in order to obtain a mutual benefit. However, the incentive to collude is polarised by a single firm’s private incentive to abandon the cooperative strategy for its own personal gains.⁸⁷ It must also be understood that the level of involvement in a cartels ranges from the core to “ring-leaders” who regulate the cartel through diplomacy, intimidation or even punitive measures.⁸⁸ The fictional alliance between cartel members is therefore born from self-interest and the continued pursuit of it.⁸⁹

This unique business relationship has served as a topic of interest for economists and sociologists who have sought to apply the “game theory” or the “prisoners dilemma”⁹⁰ both reminiscent of Jean-Jacques Rousseau’s stag hunt analogy. What both theories suggest is that one can determine how cartelists make decisions when confronted with choices that will affect their interests, in highly competitive conditions.⁹¹ a cartel relationship is maintained on the premise that the benefits (profit) obtained will outweigh the cost (prosecution). Once a cartel is in

⁸⁴ Christopher Harding, Julian Joshua *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003) 209.

⁸⁵ Ibid at 210.

⁸⁶ Ibid.

⁸⁷ Alison Jones, Brenda Sufrin *EC Competition Law: Texts, Cases, Material* 3ed (2008) 861.

⁸⁸ Harding & Joshua op cit (n84) at 212.

⁸⁹ Ibid at 210.

⁹⁰ Ibid.

⁹¹ Ibid.

existence it is the cost/benefit analysis which will take the fore and remain the prime enforcer of the relationship. The continuity of a cartel is thus based on maintaining this tipped scale.

The leniency policy is thus based on a combination of the prison dilemma and the theory of pre-emption. The theory suggests that a member imbued with fear, pre-empts the other cartel members and applies for leniency.⁹² It is in the face of hostility and adversity that the carrot and stick strategy i.e. the leniency policy has gained momentum by dangling a succulent carrot on a stick.

3.2 South African Corporate Leniency Policy

The adoption of the leniency policy in 2004 bridged the gap that existed prior to its adoption. Before the leniency policy very few collusive practices were prosecuted because most anticompetitive complaints were centre on the abuse of dominance and mergers and acquisitions.⁹³ In addition, the Commission was faced with the challenge that cartels are secretive in nature and uncovering their existence was difficult without an effective measure to draw them out.⁹⁴

The leniency policy offers immunity from an administrative penalty to any member of a cartel who comes forward and “blows the whistle” on an existing cartel by disclosing any and all relevant information to the Commission.⁹⁵ The policy is available and limited to practices prohibited in s4(1)(b). It is only applicable to “firms” as defined in the Act and must be distinguished from s 44 of the Act read with Rule 14(1) (b) which protects individuals who blow the whistle.

What the policy seeks to create is the so-called Prisoners Dilemma or stag hunt as discussed, by creating conditions that contribute to de-stabilising the cartel. The carrot is made more succulent by only granting immunity to the first cartel member to the door. This forms one of 4 salient features which form the core of the leniency policy which will be discussed below.⁹⁶ However, the leniency policy provides an additional “get-out-of-jail-free-card” by granting subsequent cartel members who approach the Commission, a reduced penalty or alternative remedies at the Commission’s

⁹² Joseph E Harrington, Jr ‘Corporate leniency programs when firms have private information: The Push Of prosecution and the pull of pre-emption’ (2013) 61 *The Journal of Industrial Economics* 2.

⁹³ Ibid.

⁹⁴ Lavoie op cit (n15) at 2.

⁹⁵ Ibid at 3.

⁹⁶ Ibid.

behest.⁹⁷ The “get-out-of-jail-free-card” may be the incentive that other cartelists need to break the fold and approach the Commission.

3.2.1 First to the door

The “first to the door” approach grants the first member of a cartel to approach the Commission, conditional immunity in exchange for evidence of an on-going cartel.⁹⁸ If the applicant is successful, they will not face any prosecution nor be subject to a fine.⁹⁹ The feature creates a pull of pre-emption and it is for that reason that subsequent applications from other cartel members are not eligible for immunity.¹⁰⁰ The applications themselves need careful consideration and therefore merely approaching the Commission does not equate to automatic immunity. The Commission thoroughly assesses the information provided by the applicant to determine whether they are eligible for conditional immunity. Various factors are considered to determine the importance of the information provided, including ‘the level at which a [leniency] application is made’ and this could include whether a firm is a subsidiary or a parent company.¹⁰¹

The marker system reinforces the pull of pre-emption of the leniency policy by enabling a cartel member, prior to making a leniency application, to reserve their position in the race to the door.¹⁰² It almost acts like a reservation at a restaurant; you are guaranteed a seat at the table without being mandated to pay for the meal yet. The Commission, at their discretion, approves the marker application and gives the applicant a deadline in which to provide the requisite information in accordance with.¹⁰³ Once the applicant has provided the evidence and any other information necessary to enable an investigation, the application for immunity will be deemed to have been requested on the date the marker application was submitted.¹⁰⁴ Therefore, the system creates a greater incentive for cartelists to come forward.

It has been debated whether subsequent applications by other cartelists should be eligible for partial immunity.¹⁰⁵ The debate is premised on whether second

⁹⁷ Supra (n17) para 5.6.

⁹⁸ Ibid para 3.1.

⁹⁹ Supra (n17) para 3.3.

¹⁰⁰ Lavoie op cit (n15) at 5.

¹⁰¹ Ibid.

¹⁰² Supra (n17) para 12.

¹⁰³ Ibid para 10.

¹⁰⁴ Leniency Policy supra (n17) para 12.

¹⁰⁵ Lavoie op cit (n15) at 5.

or third applicants should be granted conditional immunity for their cooperation. The leniency policy could benefit from a more balanced approach which entails a combination of the “first to the door” approach and partial leniency towards the second and third applicants.¹⁰⁶ Although such a proposition is likely to diminish the pull of pre-emption, it will increase the accessibility of information pertinent for the Commissions investigations.¹⁰⁷

3.2.2 Admission of contravention of the act

Once the nature and the type of the application is established, cartel conduct must be identified.¹⁰⁸ This assessment entails determining whether the conduct is in contravention of s4(1)(b) of the Act and what role the cartel member played within the cartel. The applicant is required to admit contravening certain provisions of the Act.¹⁰⁹ This requires full and honest disclosure of information and any other evidence that would assist the Commission in its investigation.¹¹⁰ The applicant will be required to cease all cartel activity immediately and must not inform other cartel members of their application.¹¹¹ Upon receipt of the application, the Commissioner will examine it to determine whether the information would qualify the applicant for immunity.

As discussed above, ‘the applicant must offer full and expeditious co-operation to the Commission concerning the reported cartel activity,’ therefore full disclosure is essential in making a leniency application.¹¹² The failure to fully co-operate can result in an increased administrative penalty as exemplified by Sasol Ltd’s settlement penalty which was increased from 6% to 8% due to the failure to fully disclose contravening s4(1)(b).¹¹³

3.2.3 Cartel activity Covered by the corporate leniency policy

The leniency policy is specifically for cartel activities which have had an effect in South Africa.¹¹⁴ Immunity is granted for separate cartel activities and does not

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid at 4.

¹⁰⁹ Leniency Policy supra (n17) para10.1.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Lavoie op cit (n15) at 5.

¹¹⁴ Leniency Policy supra (n17) para 5.2.

provide blanket immunity for all prohibited activities.¹¹⁵ The policy is aimed at cartel activity which the Commission a) is unaware of; b) is aware of and has yet to investigate due to lack of information or; c) is currently investigating but has insufficient information to prosecute.¹¹⁶ The leniency policy recognises that some firms may engage in cartel conduct unaware of its illegality and that some cartelists may refuse to disclose critical information, due to the possible consequences they could face from other cartel members.¹¹⁷ Therefore, the leniency policy also enables a certain level of anonymity with regard to applications thereby enabling cartels to safely approach the Commission without fear of prosecution by the courts or persecution from other cartel members

3.2.4 Conditional Immunity

Conditional immunity is granted at the outset of the application pending the finalisation of the case.¹¹⁸ The applicant is assured conditional immunity through a written contract on the grounds that the information they provided is enough to assist with the investigation and to prosecute the cartel.¹¹⁹ In addition the applicant must have met all the conditions set by the leniency policy throughout the proceedings.¹²⁰ Once the case has been finalised by the tribunal/appeal court, the Commission will then decide to give the applicant full immunity or none at all. During the court proceedings, the Commission maintains the right of withdrawing immunity if the applicant fails to meet the conditions associated with leniency.¹²¹

It is debatable whether the Commission should develop the leniency policy to create a distinction between leniency applications prior to an investigation and post the inception of an investigation. This is in comparison to the leniency policy in other jurisdictions such as the United Kingdom's Office of Fair Trading ("OFT") which specifically distinguishes between applications pre and post the inception of an investigation.¹²² The applicant who applies post the inception of an investigation

¹¹⁵ Ibid para 5.4.

¹¹⁶ Ibid para 5.5.

¹¹⁷ Ibid para 3.7.

¹¹⁸ Ibid para 9.1.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² OFT Notice 1495 July 2013 "Applications for Leniency and Non-action in Cartel Cases: OFT's detailed guidance on the principles and process." available at http://www.of.gov.uk/shared_of/reports/comp_policy/OFT1495.pdf, accessed on 29 August 2013.

is eligible for immunity from penalties or a reduction of the administrative penalty of up to 100%.¹²³ The distinction between the two is clear and creates the necessary incentive for cartelists to come forward.

The leniency policy since being amended in 2008 has opened the gates for more leniency applications. These amendments have made the policy more effective.¹²⁴ First, the amendment has allowed more legal certainty by removing the opaque decision-making process in exchange for transparency through the removal of discretionary powers exercised by the Commission with regard to applications.¹²⁵ Secondly, the policy has been extended to allow any member of a cartel, be it the leaders or instigators, to be able to apply for immunity.¹²⁶ The aspired result is increasing the level of distrust within a cartel and creating room for more members to approach the Commission.¹²⁷ Thirdly, applicants may submit evidence orally which limits the possibility of giving the Commission documentary evidence which can be used against them in proceedings in other courts.¹²⁸ Lastly, the process has been streamlined by assigning the Enforcement & Exemptions Division of the Commission as the body which deals with all leniency applications.¹²⁹

The measures above clearly indicate a radical policy which has incentivised members of cartels to come forward. In addition the policy has streamlined prosecutions by reducing the number of cases and promoting more settlements. It is clearly a very effective tool in combating cartel conduct.

3.3 Administrative penalties and their under deterrent nature

The current competition policy, manifested in s 4(1)(b) of the Act which prohibits any form of anti-competitive practice that amounts to price-fixing,¹³⁰ market allocation¹³¹ or collusive tendering,¹³² was born from the need to urgently address the prevalence of cartel conduct which negatively affects the market. Thus far, this has been achieved through the imposition of monetary administrative penalties

¹²³ Ibid para 2.1.6.

¹²⁴ Makhaya et al op cit (n41) at 51.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Lavoie op cit (n15) at 152.

¹³⁰ s4(1)(b)(i).

¹³¹ s4(1)(b)(ii).

¹³² s4(1)(b)(iii).

(capped at 10% of a firm's annual turnover)¹³³ on firms found guilty of anti-competitive conduct. The adjudicative system is thus characterised by a somewhat complex system of administrative penalties, discounts and factors¹³⁴ to be considered by the courts when imposing penalties. Determining an administrative penalty requires the courts to strike a precarious balance; to deter the cartel from recidivist behaviour and impose an administrative penalty which would not cripple the firm financially. Therefore, while many consumers would take pleasure in the complete demise of cartels through administrative penalties, there is the overarching necessity of maintaining economic efficiency which the 10% cap seeks to protect. Consequentially, administrative penalties are generally under deterrent.

3.3.1 Settlements

At the heart of the Commission's work are administrative penalties, the only deterrent at the Commission's disposal. Penalties are imposed through settlements or through litigation. A settlement agreement is similar to an admission of guilt in criminal law; the agreement is concluded between a cartel and the Commission for admitting guilt to contravening the Act.¹³⁵ The settlement agreement is then confirmed by the Competition Tribunal.¹³⁶ The Commission is empowered to determine a justified penalty which can be up to 10% of a firm's annual turnover in the preceding financial year.¹³⁷ The settlement process has proven to be an expeditious and effective process as evidenced by the fast track settlement process.¹³⁸

Settlements by their nature result in lesser administrative penalties than those imposed through the Tribunal/Court.¹³⁹ Pioneer Foods (Pty) Ltd settled with a fine which was less than the 10% cap it would have faced had it continued contesting the claim.¹⁴⁰ The settlement agreement was just under R1 billion and could have

¹³³ s59(2) of the Competition Act.

¹³⁴ s59(3).

¹³⁵ s23.

¹³⁶ Leniency Policy supra (n17) para 5.6.

¹³⁷ Leniency Policy supra (n17) para 14.1.3.

¹³⁸ As part of the Commission 2011/2012 year, they had a performance target of 12 settlements and managed to exceed that target by settling 28 cases.

¹³⁹ Tembinkosi Bonakele and Liberty Mncube 'Designing Appropriate Remedies for Competition Law Enforcement: The Pioneer Foods Settlement Agreement' (2011) South African Competition Commission, Fifth Annual Competition Law, Economics and Policy Conference 4 October 2011 at 7, available at <http://www.compcom.co.za/fifth-annual-conference-on-competition-law-economics-and-policy-in-south-africa/>, accessed on 12 March 2013.

¹⁴⁰ *Competition Commission vs. Pioneer Foods (Pty) Ltd*, Case no.15/CR/Mar10.

amounted to more had the matter been finalised by the Tribunal.¹⁴¹ The conclusion drawn from this is that settlements do seem to create the necessary incentive for cartels to settle but should that be at the cost of achieving proportionality in penalties? An examination of administrative penalties imposed through litigation may better illuminate the pragmatism of the settlement process.

3.3.2 Administrative penalties imposed through litigation

An administrative penalty is a fine that may not be more than 10% of the annual turnover earned within the Republic of South Africa in the preceding financial year.¹⁴² The first ever financial penalty to be administered by the Competition Tribunal was in *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd*.¹⁴³ It was a historic moment for the administration of financial penalties but, the beginning of a relatively uncertain exercise. Penalties are regarded as a deterrent against cartelisation. It is hoped that if cartels are aware of the magnitude of the financial penalties, they are less likely to partake in that conduct. The court in *Southern Pipeline Contractors and Conrite Wals (Pty)Ltd v Competition Commission*¹⁴⁴ aptly described the approach that should be applied when imposing administrative penalties as follows:

[A] penalty which is of a criminal nature should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular...the imposition of an administrative penalty should not only promote the important objective of deterrence but that sight should not be lost of fairness to the offending party. In particular, a penalty should not be imposed in order to destroy the business of the offending party, a point confirmed by s59(2) which places a cap on the amount of a penalty which may be imposed; that is it cannot exceed 10% of the offending firm's annual turnover in the Republic and its exports during that firm's preceding financial year.

The Act is a regulatory document. Consequentially, it subscribes to the constitutional dispensation which calls for an interpretation that is in line with the spirit, purport and object of the Bill of Rights.¹⁴⁵ Therefore, penalties cannot be imposed wilfully but must be given a more equitable interpretation.¹⁴⁶

¹⁴¹ Ibid.

¹⁴² s59 (2) of the Competition Act. It should be noted that the preceding financial year is regarded as June – May of the following year as per the judgment of *The Competition Commission and Federal Mogul Aftermarket Southern Africa (Pty) Ltd* [2003] 2 CPLR 464 (CT) para 169.

¹⁴³ Ibid.

¹⁴⁴ *Southern Pipeline Contractors and Conrite Wals (Pty)Ltd v Competition Commission* Case no. 105/CAC/Dec10 para 9.

¹⁴⁵ s39 of the Constitution of the Republic of South Africa, 1996.

¹⁴⁶ *Southern Pipeline Contractors* supra (n144) para 9.

Administrative penalties share similarities with criminal penalties as highlighted in *Southern Pipeline Contractors* and therefore, the element of proportionality must remain at the fore of their imposition.¹⁴⁷ Therefore, the 10% cap which s59(2) requires on a firm's annual turnover, creates the maximum penalty which can be imposed on a firm after considering the factors in s59(3). For the purposes of this discussion it is not necessary to delve into the details of the courts adjudicative process but rather to acquire a general understanding of how the process is applied and how effective it is.

The legal framework does not provide a definitive guide on how administrative penalties are to be enforced and consequentially the courts apply their own discretion. Once a) contravention of s4(1)(b) has been identified, economic harm is presumed and the courts need only consider the factors listed in s59(3)¹⁴⁸, evidence presented, mitigating and aggravating factors. In *Competition Commission v South African Airways (Pty) Ltd*¹⁴⁹ the court attempted to provide a guideline for this process. There are by no means hard and fast rules applicable to future cases but, they served as the apex of this type of enquiry. The *Southern Pipeline Contractors* judgment represented a departure from the guidelines established in *South African Airways*. The court based its assessment on the annual turnover of the firm as opposed to the affected turnover (turnover directly derived from the prohibited activities).¹⁵⁰ The result was a huge disparity between penalties imposed on the "annual turnover" which is much larger than the "affected turnover" and which may constitute a very small percentage of the annual turnover.

South African Airways judgment indicates that this is still a relatively vexing exercise for the courts because it breeds a level of uncertainty in determining penalties. The lack of a standardised and certain process creates the possibility of inequitable penalties being imposed.

¹⁴⁷ Ibid.

¹⁴⁸ (a) the nature, duration, gravity and extent of the contravention;

(b) any loss or damage suffered as a result of the contravention;

(c) the behaviour of the *respondent*;

(d) the market circumstances in which the contravention took place;

(e) the level of profit derived from the contravention;

(f) the degree to which the *respondent* has cooperated with the Competition Commission and the Competition Tribunal; and

(g) whether the *respondent* has previously been found in contravention of *this Act*.

¹⁴⁹ *Competition Commission v South African Airways (Pty) Ltd* Case No. 18/CR/Mar01.

¹⁵⁰ *Southern Pipeline Contractors and Conrite Wals (Pty)Ltd v Competition Commission* supra (n144).

The court in *Competition Commission v Aveng (Africa) Limited t/a Steeldale*¹⁵¹ highlighted that its approach to administrative penalties has been to borrow principles from other jurisdictions most notably the EU to apply in conjunction with s59(3).¹⁵² A six-step approach was developed and applied by the Competition Tribunal and is as follows:¹⁵³

Step one: determination of the affected turnover in the relevant year of assessment.

Step two: calculation of the ‘base amount,’ being that proportion of the relevant turnover relied upon.

Step three: where the contravention exceeds one year, multiplying the amount obtained in step 2 by the duration of the contravention.

Step four: rounding off the figure obtained in step 3, if it exceeds the cap provided for by section 59(2).

Step five: considering factors that might mitigate or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it.

Step six: rounding off this amount if it exceeds the cap provided for in section 59(2). If it does, it must be adjusted downwards so that it does not exceed the cap, as explained by the CAC in *Southern Pipeline Contractors*.

The guidelines above were developed by the Tribunal in *Aveng*. The general approach has been to apply s59(3) without exceeding the statutory cap. Even if a firm's conduct may warrant an administrative penalty exceeding the 10% cap, s59(2) prevents it and creates a formidable challenge in achieving the deterrent effect. What compounds this problem is the differing approaches applied in each case, which resulted in a 50% reduction in administrative penalties imposed on two firms who were guilty of contravening s4(1)(b).¹⁵⁴ The fines were reduced from R16 882 to R 8 720 000.00 597.00 and R 6 192 457.00 to R 2 037 070.00. The reduction was a result of differing considerations in calculating the penalty; notably there was no indication that the Competition Appeal Court had considered the appellants active involvement

¹⁵¹ *Competition Commission v Aveng (Africa) Limited t/a Steeldale* Case No.84/CR/Dec09.

¹⁵² *Ibid* para 36.

¹⁵³ *Ibid*.

¹⁵⁴ *Southern Pipeline Contractors* *supra* (n144) para 85.

in the cartel for 13 years.¹⁵⁵ The judgment is indicative of how regressive the process can be. A penalty of R6 192 457.00 for actively participating in a cartel for 13 years does not seem to meet the proportionality principle nor does it create a deterrence.

The incongruence of the policy and the desired effects constrain the creation of the necessary competitive conditions which the prisoner's dilemma calls for. Economic theory suggests that to achieve an optimal penalty two factors must be considered: economic harm and the unlawful gains by the offender.¹⁵⁶ Instead, the imposition of penalties fails to consider the harm or the gains, but is centred on '[applying] a number of rules to approximate the effects.'¹⁵⁷ Another more significant consideration is that of allocative efficiency. A competitive market promotes consumer welfare by ensuring firms which cannot survive in a competitive market are expelled to promote efficiency and consumer welfare.¹⁵⁸ This is inherently a natural safeguard which protects consumer welfare. Allocative efficiency thus propels firms towards productive efficiency, innovation and a general equilibrium within the market.

Cartels as is their nature create an artificial market which enables inefficient firms to thrive.¹⁵⁹ However, once this artificial market is dissolved and the penalties have been imposed and the firm is unable to survive the market, it deserves to be removed from the market.¹⁶⁰ As Motto describes it, '[the] process of Darwinian selection is good,'¹⁶¹ a sentiment which most consumers would share. As mentioned before, if penalties are proportional to the harm, the guilty firms are likely to be liquidated due to the financial burden the penalties create. Once again, the competition authorities find themselves on a slippery slope.

Nonetheless, 'deterrence through the use of fines will work, if and only if, from the perspective of the company contemplating whether or not to commit a violation, the expected fine exceeds the expected gain from violation.'¹⁶² The *status quo* has illustrated that administrative penalties do not create the desired deterrent

¹⁵⁵ *Southern Pipeline Contractors* supra (n144) para 62.

¹⁵⁶ *Aveng* supra (n151) para 37.

¹⁵⁷ *Ibid.*

¹⁵⁸ Massimo Motta 'On cartel deterrence and fines in the European Union' (2008) *European Competition Law* 209 at 209.

¹⁵⁹ Motta op cit (n159) at 217.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Bonakele & Mncube op cit (n139) at 8.

effect and although the leniency policy remains the most effective tool it will be meaningless once the Amendment Act¹⁶³ which will criminalise cartels, is promulgated. The Amendment Act will hold directors criminal liability for a fine of up to R500, 000 fine or up to 10 years imprisonment. Cartelists will be less likely to risk criminal liability and this will undermine the incentive created by the leniency policy. What would be more beneficial is a revision of the leniency policy with the amendment in mind. Perhaps, the Amendment could be extended to include immunity from criminal prosecution which albeit may actually undermine the amendment itself. Nonetheless, a harmonious regulatory framework is necessary to ensure efficiency in combating cartels while increasing the desired deterrent effect.

3.4 Conclusion

The Commission undoubtedly has a difficult task in playing the “cartel police” if one can attribute them to that role. A closer look at the framework reveals unclear standards of analysis for administrative penalties which could unravel the progress that has been made thus far. The leniency policy, which will soon resemble a stick without a carrot, will lose the pre-empting effect it had once cartels are criminalised.

An assessment of the *status quo* is indicative of a cyclical pattern in which cartels are punished with penalties and “released” back into the economy where they are allowed to continue flourishing. Unfortunately, the system remains relatively reactive. With cartel numbers on the rise and the looming amendment (which is bound to plunge them back into secrecy) the penalties have become part and parcel of the cost of doing business. Consequentially, the deterrent effect sought by administering penalties is slowly becoming obviated. Although criminalisation has worked in other jurisdictions such as the United States, I submit that it is a premature exercise in South Africa as will be discussed in the following chapter. Emphasis should be placed on empowering consumers to counteract anticompetitive behaviour through private litigation an argument that will also be presented at a later stage.

¹⁶³ Competition Amendment Act 1 of 2009.

CHAPTER 4

A THEORETICAL ANALYSIS OF THE CARTEL OFFENCE

4.1. The Competition Amendment Act 1 of 2009

The introduction of s73A into South African Competition Law has been met with resistance and in some instances outright anathema.¹⁶⁴ Some have even described it as a badly advised piece of legislation.¹⁶⁵ The Law Society of South Africa in its submission to the Portfolio Committee on Trade and Industry provided that the cartel offence would ‘hinder the investigation of cartels and should be replaced by personal sanctions.’¹⁶⁶ In favour of the South African business community, Business Unity South Africa submitted to the Portfolio Committee on Trade and Industry ‘that the Competition Amendment Bill would unfavourably increase the scope of criminal liability for company directors in terms of uncompetitive business practice as mere knowledge of anti-competitive behaviour would now constitute [a] criminal offence.’¹⁶⁷ The Amendment, which was passed over two years ago and signed by the president, has yet to come into force. The Amendment Act will introduce several amendments to the existing Competition Act. The amendments are as follows¹⁶⁸:

- 1.) Concurrent Jurisdiction over competition matters;
- 2.) Complex Monopolies;
- 3.) Market Inquiries;¹⁶⁹
- 4.) Personal Responsibility of directors and officers of firms; and
- 5.) Leniency for whistleblowers – this will provide a complete amendment of the Commission’s Corporate Leniency Policy.

The amendments are meant to supplement and reinforce the competition framework which as discussed, has been heavily reliant on the leniency policy and administrative penalties. However, as mentioned, the Amendment Act was not

¹⁶⁴ Amanda Visser ‘Sterner competition law yet to come into force’ Bdlive 6 August 2012, available at <http://www.bdlive.co.za/articles/2011/12/08/sterner-competition-law-yet-to-come-into-force.jsessionid=0943F6A8915D27FB33D3063DEFFC301D.present2.bdfm>, accessed on 29th August 2013.

¹⁶⁵ Ibid.

¹⁶⁶ SabinetLaw ‘Law society presents legal profession’s perspective on competition amendments bill’ 30 July 2008.

¹⁶⁷ Sabinetlaw ‘BUSA outlines concerns regarding competition amendment bill’ 29 July 2008.

¹⁶⁸ See Memorandum on the Objects of the Competition Amendment Bill

¹⁶⁹ Section 6 Market Inquiries came into force on the 6th April 2013.

promulgated due to various objections which among other things related to the unconstitutionality of various provisions; this will be expanded on in the following chapter.

Section 73A will, upon promulgation, criminalise cartel conduct and in essence establish a cartel offence. Section 73A provides that

‘a director of a firm who is in a position of authority commits an offence if they engage in a prohibited practice in terms of [s 4(1)(b)] or knowingly [acquiesces] to said prohibited practice.’

Personal sanctions against directors will include a fine of up to R500, 000 and/or imprisonment for a period not exceeding 10 years.¹⁷⁰ The provision essentially pierces the corporate veil, a concept which was vehemently objected to in company law until it was legislated recently.¹⁷¹ Most importantly for the South African competition authorities, it will undermine the strength of the leniency policy; the commissions main tool for cartel enforcement.¹⁷² Therefore, from the outset the introduction of a cartel offence has been met with disdain and is not exactly regarded as the saving-grace for public competition enforcement.

Formulating an effective criminal framework for cartel activity in South Africa will require the consideration of varying elements, the most pertinent being the protection of the leniency policy. The current framework does not guarantee that cartelists will be apprehended for partaking in prohibited anticompetitive conduct. It is for that reason, that the general penalty for cartel conduct should be increased to off-set the diminished chance of detection and criminal prosecution as will be touched on at a later stage.¹⁷³ This cost-benefit analysis/proportionality assessment should be extended to prosecutorial authorities; to ensure that enforcement is economically feasible through the careful selection of which cases are prosecuted.¹⁷⁴

As touched on in previous chapters, price-fixing, market allocation and bid-rigging are inefficient cartel activities which do not contribute to consumer welfare. As a result, there are no economic gains received from cartel activities. Consequentially, legislative enforcement should be geared towards penalties that strike a balance between conveying the disdain for cartel activity and the principle of proportionality.

¹⁷⁰ s74 of the Competition Amendment Act.

¹⁷¹ See s20(9) of the Companies Act 71 of 2008.

¹⁷² David Lewis *Thieves at the Dinner Table* (2012) 227.

¹⁷³ Patricia Rosochowicz ‘The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law’ (2004) 25 *European Competition Law Review* 752 at 753.

¹⁷⁴ *Ibid.*

4.2 The Cartel Offence, an appropriate remedy?

Cartels on a global scale share similar characteristics and it is this homogeneity that has enabled various jurisdictions to draw from other legal frameworks in employing remedies to deal with cartel activity. The cartel offence has formed the centre of many debates among competition enforcers and scholars as an effective remedy. There is a general consensus among the international community that cartel activity results in economic harm and it has been suggested that criminal sanctions would provide a sufficient remedy for cartel activity.¹⁷⁵ This has been indicated by the introduction of the cartel offence in various competition frameworks, although the process has been slow.¹⁷⁶ Canada (the first jurisdiction to implement competition legislation) criminalised cartel activity in 1889, the United Kingdom criminalised cartel activity in 2002 and Australia criminalised cartel activity in 2009. Criminal sanctions have however only routinely been implemented in the United States, perhaps indicative of the unsuitability of the cartel offence in all jurisdictions.¹⁷⁷

There are essentially three main challenges which I have identified that need to be assessed prior to introducing the cartel offence:

- (i) The moral nexus of the crime;
- (ii) The adequate application of the so-called “traditional” theories of punishment; and
- (iii) Ensuring the normative framework is efficient.

The discussion that follows will attempt to address these challenges and ultimately determine whether the cartel offence has a place in competition law. Chapter 5 will provide a comparative assessment of the competition framework in the United States and the United Kingdom and indicate whether South Africa does in fact need a cartel offence.

¹⁷⁵ Lewis op cit (n172) 225.

¹⁷⁶ Ibid.

¹⁷⁷ Terry Calvani, Torello Calvani ‘Cartel sanctions and deterrence’ (2011) 56 *The Anti-trust Bulletin* 185 at 188.

4.2.1 Origins of the cartel offence

The origins of the cartel offence can be found in Canada, which promulgated the cartel offence in 1889.¹⁷⁸ However, the United States has been the most robust in enforcing the cartel offence since the inception of the Sherman Act¹⁷⁹ in 1890. The Sherman Act made cartel activity a criminal offence punishable by a maximum of one year imprisonment.¹⁸⁰ However, only two cases in 1921 and 1959 had prison sentences imposed.¹⁸¹ It was argued in *United States v Alton Board Co*¹⁸² that cartel activities had not been subject to frequent imprisonment because they were not regarded as crimes which were morally reprehensible and therefore did not warrant imprisonment.¹⁸³ Consequentially, the 48 individuals who were found guilty of collusive tendering were sentenced to a total of 75 days imprisonment.¹⁸⁴

In 1987, revised guidelines on federal criminal sentencing were introduced and provided for increased sanctions for cartel activity.¹⁸⁵ The result was a dramatic increase in the average sentence of cartelists to 247 days and fines of over \$100 million.¹⁸⁶ In 2004, maximum criminal sanctions for cartelists were increased from a maximum of 3 years to 10 years.¹⁸⁷ Competition authorities in the United States recognised that the criminalisation of cartelists has been a highly effective tool in competition enforcement and most importantly in deterring cartel activity.¹⁸⁸ Although there are various arguments for and against the cartel offence, the point of departure for this discussion, is whether various jurisdictions regard cartel activity as morally reprehensible enough to warrant the use of criminal sanctions.

¹⁷⁸ Hoffman, Charles Paul, 'A Reappraisal of the Canadian Anti-Combines Act of 1889' (July 17, 2013) Queen's Law Journal, Forthcoming, available at <http://ssrn.com/abstract=2295044>, accessed on 29 September 2013.

¹⁷⁹ Sherman Act of 1890

¹⁸⁰ s1.

¹⁸¹ Gregory J Werden 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime' (2009) 5 *European Competition Journal* 19 at 20.

¹⁸² *United States v Alton Box Board Co.*, 1977-1 Trade Cases (CCH) 61,336 (N.D.III.1977).

¹⁸³ Werden op cit (n181) at 20.

¹⁸⁴ Ibid at 21.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

¹⁸⁸ *Calvani & Calvani* op cit (n177) at 193.

4.2.2 The Moral dilemma

The cartel offence, as a criminal sanction needs to be justified and rationalised in order to be implemented. A survey among British Citizens revealed that only one in ten citizens thought that imprisonment was an appropriate sanction for individuals who were found guilty of cartel activity.¹⁸⁹ In Australia, the public opinion was divided over whether imprisonment constituted an appropriate sanction for cartel activity or not.¹⁹⁰ General public perception is more inclined to the prevention crimes with a visible and direct impact than non-violent acquisitive crimes, like cartel activity. The consequence is that it becomes more difficult for the public to recognise the severity of cartel activity and most importantly to appreciate the “blameworthiness” the activity should attract. The indirect nature of the activity creates a somewhat “victimless” situation.

In the South African context concepts such as the “Zinn triad”¹⁹¹ applied in sentencing processes which require a proportionality test to be applied between the crime, the offender and the interests of society, form a significant consideration in determining the moral turpitude of a criminal sanction. The tripartite framework is not a definitive consideration for the imposition of criminal sanctions but can form the basis for an assessment of a new criminal framework in South Africa.¹⁹²

Therefore, without the traditional response to cartel activity of moral condemnation should cartel activity be subject to criminal sanctions?

Some would argue that cartel activity can be equated to other crimes because cartelists illustrate the same furtive conduct. The only distinction is that one is not fully cognisant of this conduct when it occurs. This does not mean that the harm is entirely unnoticeable, nor does it fall outside the bounds of criminal behaviour. Cartel activity results in a real social harm and this is evident in inflated prices for goods on the market outside the legal bounds of a free market economy.¹⁹³ The increased profits are achieved by creating contrived market conditions through acts

¹⁸⁹ Julie Clarke ‘The increasing criminalization of economic law – a competitive perspective’ (2012) 19 *Journal of Financial Crime* (19) 76 at 77.

¹⁹⁰ Ibid.

¹⁹¹ See *S v Zinn* 1969 (2) SA 537 (A).

¹⁹² Peter Whelan ‘Cartel Criminalization and the Challenge of Moral Wrongfulness’ (2013) 33 *Oxford Journal of Legal Studies* 535 at 539.

¹⁹³ Werden op cit (n181) at 27.

such as price fixing and not by natural competitive processes.¹⁹⁴ The association of cartel activity as a property crime thus seems justifiable.

4.3 Traditional criminal theories of punishment

4.3.1 Retributive theory

The purpose of retributive punishment is to avenge the conduct of the perpetrator through a proportionality assessment; the ‘punishment should be of equal value to the seriousness of the offence in order for the offender to receive its “just desert.”’¹⁹⁵ The effect of the punishment is essentially to “rescind” the crime and therefore return the effectiveness of the law and the rights it protected.¹⁹⁶ It does not seek to prevent potential offenders or offenders from committing crimes but to merely punish them for their conduct.

Competition regulation is a form of economic regulation.¹⁹⁷ Therefore, offences brought about by economic regulation do not rely on moral turpitude in comparison to more traditional crimes.¹⁹⁸ The application of the retributive theory would be vested on the typography of the cartel offence and its ability to reflect social disdain for cartel activity.¹⁹⁹ In South Africa, the application of this theory would be ill-advised due the divergent theoretical basis for criminal sanctions.²⁰⁰ Regulatory laws in South Africa are based on the theory of deterrence.²⁰¹ Consequentially the objectives of the retributive theory would not be suitable in recognising the objectives of competition law in general.

4.3.2 Deterrence theory

4.3.2.1 Traditional perspective

The deterrence theory, which has its foundations in utilitarianism, has found universal application.²⁰² The theory forms a central component of criminal

¹⁹⁴ Clarke op cit (n189) at 84.

¹⁹⁵ Rosochowicz op cit (n173) at 753.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Kelly op cit (n2) at 324.

²⁰¹ Ibid.

²⁰² Rosochowicz op cit (n173) at 753.

punishment within South Africa.²⁰³ The fundamental premise underlying the deterrence theory is that:

‘suffering is a pain that should be avoided and that, as a result, punishment, itself a form of suffering could not be justified unless a specific social benefit or utility can be derived from its imposition.’²⁰⁴

The punishment/sentence is thus not directed at the crime itself, but at reducing the frequency within which crimes occur.²⁰⁵ The cartel offence is predicated on creating a special deterrence by implementing non-indemnifiable sanctions on directors.²⁰⁶ Therefore, the objectives of the deterrence theory would provide a theoretical framework within which the cartel offence can operate. As a result, the deterrence theory would find better application in competition law than the retributive theory.

4.3.2.2 An Economic perspective

The economic theory of deterrence provides that individuals are assumed to make rational decisions to benefit their own interests, a common occurrence for cartelists.²⁰⁷ From an economic point of view, one must ensure that the cost the cartel will bear is greater than the benefit, thereby creating a disincentive for cartel conduct.²⁰⁸ From an efficiency point of view, the theory provides that if the conduct is efficient and beneficial to the attainment of social and consumer welfare in South Africa, then the conduct should be promoted.²⁰⁹ Therefore, the ‘benefit of punishment [must be] equal to its marginal cost.’²¹⁰ This translates to not only ensuring that the criminal sanctions imposed result in the promotion of consumer welfare but, that the practical cost for enforcing these sanctions is equally beneficial and financially viable for the enforcing institutions.

Imprisonment although bearing a cost to society, has a greater deterrent effect. Imprisonment is a drastic situation that strips an individual of their freedom of movement. Most importantly, the social stigma associated with imprisonment is one

²⁰³ Rosochowicz op cit (n173) at 753

²⁰⁴ Peter Whelan ‘A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law’(2007) 4 *The Competition Law Review* 7 at 10.

²⁰⁵ Ibid at 11.

²⁰⁶ Whelan op cit (n192) at 540.

²⁰⁷ Whelan op cit (n204) at 11.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Whelan op cit (n204) at 12.

that cannot be equated with a monetary penalty.²¹¹ Therefore, the possibility that cartel conduct may result in imprisonment creates a greater deterrent than a monetary penalty. It is for this reason that countries like the United States have advocated for other jurisdictions to introduce the cartel offence.

4.4 Conclusion

The traditional and economic theories of deterrence provide a clear framework within which the cartel offence can operate. As mentioned above South Africa's regulatory laws are rooted in the utilitarian concept of deterrence. The theories closely align with the objectives of a competition law framework, namely achieving and maintaining economic efficiency. This is achieved by ensuring that the typography of the cartel offence deters cartel activity by ensuring that "the cost of non-compliance is imposed on one individual, or company, in order to benefit society as a whole."²¹² However, s73A fails to create such a framework as will be argued in the following Chapter.

²¹¹ Rosochowicz op cit (n173) at 755.

²¹² Kelly op cit (n2) at 324.

CHAPTER 5

A COMPARATIVE ANALYSIS OF THE CARTEL OFFENCE IN THE UNITED KINGDOM, THE UNITED STATES AND SOUTH AFRICA

Based on the preliminary literature provided in Chapter 4 of this dissertation, it is contended that the cartel offence is properly criminal. The comparative analysis that follows will address the last aspect (ensuring the efficiency of the normative framework) as identified in Chapter 4. The discussion will endeavour to illustrate that the cartel offence can provide an effective deterrence to cartel conduct and that it has been prematurely introduced within the South African competition framework.

5.1 The Cartel Offence in the United Kingdom

The cartel offence was introduced in the United Kingdom under s190 of the Enterprise Act.²¹³ It was introduced as a measure to fill the lacunae created by the 10% administrative penalty cap.²¹⁴ The Treasury/Department of Trade and Industry compiled a white paper on the cartel offence.²¹⁵ The white paper revealed that there was a possibility that the cap would result in administrative penalties which were not proportional to the harm caused by cartelists.²¹⁶ As discussed in Chapter 3, if the penalties imposed were proportional to the cartel activity, it would result in dire financial consequences for the implicated firm. The white paper was further reviewed in a subsequent report which culminated in the cartel offence being introduced in 2003.²¹⁷ Thus, the cartel offence is regarded in the United Kingdom as a complimentary solution.

²¹³ The Enterprise Act of 2002.

²¹⁴ Andrea Stephan "UK cartel offence: lame duck or black mamba" (2008) *ESRC Centre for Competition Policy (CCP) Working Paper No. 08-19*, at 3, available at SSRN: <http://ssrn.com/abstract=1310683>, accessed on 29 August 2013.

²¹⁵ See Department of Trade and Industry 'A World Class Competition Regime' July 2001, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dti.gov.uk/ccp/topics2/pdf2/cm5233.pdf>, accessed on 29 August 2013.

²¹⁶ Ibid.

²¹⁷ Eleanor J Morgan 'Criminal Cartel Sanctions under the UK Enterprise act: An Assessment' (2010) 12 *International Journal of the Economics of Business* 67 at 70.

5.1.1 Legislation: The Enterprise Act

Part 6 of the Enterprise Act introduced the cartel offence. Under Part 6 of the Enterprise Act an individual who dishonestly agrees with one or more other persons to:

- (i) Directly or indirectly fix prices for the supply of goods or services in the United Kingdom;²¹⁸
- (ii) To limit or prevent the production or supply of goods and services in the United Kingdom;²¹⁹
- (iii) To allocate markets/divide customers to engage in bid-rigging;²²⁰ is guilty of the cartel offence.

An individual found guilty of said conduct will be criminally liable to imprisonment of up to five years, an unlimited fine or both.²²¹ Much like s 73A of South Africa's Competition Act, the United Kingdom's cartel offence also recognises *per se* prohibitions but diverges from s73A in several ways which can be regarded as instrumental features for cartel enforcement in the United Kingdom. These features will be highlighted below.

5.1.2 Authoritative body : Office of Fair Trade

The OFT is the equivalent of the Competition Commission in South Africa. It is the body in charge of enforcing the Enterprise Act. Section 192 of the Enterprise Act empowers the OFT to conduct investigations related to the cartel offence. The OFT works in conjunction with the Serious Fraud Office ("SFO") an organisation entrusted with handling fraud cases.²²² The Enterprise Act provides clear and succinct regulations governing how investigations may be conducted. The OFT may launch an investigation if 'there are reasonable grounds for suspecting that an offence under section 188 has been committed.'²²³ If it is shown that a criminal investigation is likely to ensue, the OFT may forward the case to the SFO or continue their investigation in co-operation with the SFO.²²⁴

²¹⁸ s188(2)(a) of the Enterprise Act.

²¹⁹ s188(2)(b), s188(2)(c).

²²⁰ s188(2)(d), s188(2)(e).

²²¹ S190(1)(a).

²²² Morgan op cit (n217) at 70.

²²³ s192.

²²⁴ Morgan op cit (n127) at 70.

The Memorandum of Understanding ‘which records the basis on which they will cooperate to investigate and/or prosecute individuals in respect of the cartel offence’ is signed between the SFO and the OFT.²²⁵ It enables both institutions to maintain continuous dialogue and to contribute to maximum efficiency. Once a reasonable ground has been identified to pursue the matter, the OFT may compel person(s) being investigated to provide documents that attest to the offence.²²⁶ They are able to obtain search warrants on permission of the courts, to search the premises of the person(s) being investigated.²²⁷ In addition, the OFT has the extraordinary advantage of surveillance powers on a person(s) being investigated for the alleged offences.²²⁸

5.1.3 No-Action letters and competition disqualification orders

The drafters of the Enterprise Act empowered the OFT to issue what are referred to as no-action letters.²²⁹ The notice exempts a cartel from criminal prosecution under the cartel offence for partaking in cartel activity.²³⁰ The individual who applies for the no-action letter is required to, among other things, to admit to participation in the criminal offence, cooperate with the OFT by providing all information regarding cartel activities, and to refrain from engaging in any activities pursuant to the cartel nor to take any steps that may act against the OFT’s investigation.²³¹ A no-action letter is issued if it has been illustrated that the cartel will face prosecution and that they meet the requirements.²³² The OFT notice also clearly sets out the conditions under which the no-action letter can be revoked.

In addition to the no-action letters, the OFT has an interesting feature known as Competition Disqualification Orders (“CDO”)²³³ which if granted by the OFT, prevents or disqualifies a director of a company which commits a breach of competition law.²³⁴ The no-action letter also prevents a CDO being granted against

²²⁵ Whish & Bailey op cit (n3) at 430.

²²⁶ s193.

²²⁷ s194

²²⁸ s199.

²²⁹ OFT Notice 513 “The Cartel Offence, Guidance on the issue of no-action letters” April 2003 at para 1.2, available at http://www.ofi.gov.uk/shared_ofi/business_leaflets/enterprise_act/ofit441.pdf, accessed on 29 August 2013.

²³⁰ Ibid para 3.14.

²³¹ Ibid para 3.3.

²³² Ibid ara 3.10.

²³³ s 204 (9A).

²³⁴ Supra (n231) para 3.14.

executives.²³⁵ In order for the executive to have the court order granted against them, they must have been part of a firm that commits a breach of competition law²³⁶ and secondly, that the conduct, according to the courts, makes the director unfit to manage the company.²³⁷ The CDO's are similar to s69 of the Companies Act²³⁸ which permits the disqualification of directors through a court order for listed reasons.²³⁹

The availability of no-action letters for cartelists is indicative of the importance of the leniency policy. As discussed in Chapter 3, the leniency policy is undermined by a framework which fails to protect the incentive the policy creates. No-action letters extend immunity to criminal prosecution²⁴⁰ and therefore highlight that the framework within which the cartel offence operates is more complimentary, than in South Africa.

5.1.4 The Burden proof

The United Kingdom's cartel offence calls for a slightly different burden of proof. In South Africa, if an individual/firm is found guilty of *per se* prohibited conduct, they are automatically found to have committed that conduct and are criminally liable according to s73A. The formulation of the cartel offence in the Enterprise Act provides a different approach for a finding of guilt. Section 188 provides that an individual is guilty of the criminal offence if they 'dishonestly [agree] with one or more other persons to implement, or to cause to be made or implemented any prohibited activities provided in s188 (2).' The provision creates a standard of dishonesty which was set out in *R v Ghosh*²⁴¹ and applied in criminal cases in the United Kingdom.

The judgment set out a two-stage test which must be applied to prove dishonesty. The first leg of the test, based on an objective inquiry, asks whether '...according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by that standard, that is the end of the

²³⁵ Ibid para 3.15.

²³⁶ s204(2).

²³⁷ s204(3).

²³⁸ The Companies Act 71 of 2008.

²³⁹ See s69(8)(b) of the Companies Act 71 of 2008.

²⁴⁰ OFT Notice 531supra (n229) para 3.14.

²⁴¹ *R v Ghosh* [1982] 2 ALL ER 689.

matter.²⁴² If the defendant was dishonest according to those standards, the jury must turn to the second leg of the inquiry. The second leg of the test, based on a subjective inquiry, asks ‘whether the defendant himself must have realised that what he was doing was by those standards dishonest.’²⁴³

The burden of proof leaves room for a defendant to argue that they acted “honestly” a window which is not available in s73A. The defence creates an evidentiary burden for the prosecution which as discussed, is removed through *per se* prohibitions.²⁴⁴ The courts have also acknowledged that the test for “dishonesty” has posed some difficulties for prosecutors due to the ambiguity of defining “dishonesty”.²⁴⁵ Nonetheless, these sorts of challenges form the naturalia of any jurisprudence. What is essential is that s188 provides the necessary incentive for cartelists to confess to cartel activity, an incentive which is lost in s73A.

5.1.5 Effectiveness

Legislation is merely a declaration of intention; it has to be monitored, evaluated and enforced in order for it to be effective. This forms a crucial consideration in determining whether the cartel offence will result in increased public enforcement against cartels. As highlighted previously, this refers to creating the desired deterrent effect. If it can be illustrated that the sanction would result in such deterrence, then the cartel offence will be beneficial to society.

The OFT’s prosecutions through the cartel offence have proved less fruitful than one would have expected. The Marine Hoses cartel is the first and only case the OFT has successfully prosecuted under the cartel offence.²⁴⁶ The Managing Directors, Bryan were all found guilty under the cartel offence in the United Kingdom after being arrested in the United States. All three parties were sentenced to 2 years, 20 months and 2 ½ years respectively.²⁴⁷ In addition the three executives were disqualified from their executive positions through CDO’s for a period of between 5 and 7 years.²⁴⁸

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Stephan op cit (n214) at 19.

²⁴⁵ Morgan op cit (n217) at 75.

²⁴⁶ OFT Concluded prosecutions – Marine Hose, available at http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/criminal-cartels-completed/marine-hose#.Um_MPXCnoSU, accessed on 23 October 2013.

²⁴⁷ Ibid.

²⁴⁸ Morgan op cit (n217) at 77.

The highly publicised case regarding Virgin Atlantic Airways fixing prices of passenger fuel surcharges in 2006, did not result in a successful criminal prosecution. In a review conducted by the OFT Board, it was highlighted that the criminal case collapsed due to legal and practical challenges faced by the OFT as the prosecuting authority.²⁴⁹ The Board highlighted that the most problematic aspects of case management, had to do with the delineation of privileged and commercially sensitive information given by leniency applicants.²⁵⁰ As part of its recommendations, the Board required the OFT to review its leniency guidelines to remedy the irregularities they faced throughout the case.²⁵¹

As highlighted, the *R v Gosh* test has created a hurdle for securing prosecutions and thus needs to be remedied. Immunity granted to cartelists by the European Commission does not extend to cartelists on a national scale and therefore has the potential of affecting the leniency policy.²⁵² Lastly due to the lack of a settlement process for violating the cartel offence, all cases must go to trial. They system may be better served by the availability of a settlement process.²⁵³ The findings of the Board and the challenges discussed illustrates that no legal framework is infallible. The Enterprise Act reinforces the powers of the OFT as a competition authority in principle The United Kingdom's regulatory competition framework on the whole is indicative of a complimentary framework as highlighted above and has the ingredients for a very effective system. Most importantly, the Act does not seek to undermine the crucial components of cartel enforcement, a problem evident in the formulation of s73A.

5.2 THE 'CARTEL OFFENCE' IN THE UNITED STATES

5.2.1 Legislation: The Sherman Act

The United States is a routine applier of the cartel offence. The enactment of the Sherman Act²⁵⁴ in the United States introduced the criminalisation of cartel conduct. The Act initially recognised cartel conduct as a misdemeanour offence i.e. a crime

²⁴⁹ OFT Project Condor Board Review, October 2010, available at http://www.offt.gov.uk/shared_offt/board/2010/Project_Condor_Board_Review.pdf, accessed on 23 October 2013.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Stephan op cit (n214) at 4.

²⁵³ Ibid at 25.

²⁵⁴ The Sherman Act of 1890

which is not very serious, a decision which can be attributed to the categorisation of cartel activity as ‘not [being a crime] of moral turpitude.’²⁵⁵

Section 1 of the Sherman Act provides that

‘every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.’

The provision prohibits any form of concerted practice in restraint of trade or commerce.²⁵⁶ The penalty for such conduct will result in a criminal conviction or a fine. In 2004, the criminal statutory penalty was increased to 10 years, the individual fine was increased from \$1 million to \$10 million and the corporate fine was increased from \$10 million to \$100 million.²⁵⁷ These developments are indicative of a strong inclination towards criminal enforcement for hard-core cartel activity.

5.2.2 Authoritative body: The United States Department of Justice

The success of the cartel offence in the United States can be attributed to its structural characteristics. There is a division between the institutions which conduct civil cartel enforcement and criminal cartel enforcement. The Department of Justice (“DOJ”) has an Antitrust Division which has sole jurisdiction over federal criminal antitrust enforcement.²⁵⁸ The Federal Trade Commission (“FTC”) handles civil competition enforcement. Criminal enforcement has been localised to “hard-core” cartel activity; price-fixing, market allocation and bid-rigging. No defence is afforded to cartelists found guilty of *per se* prohibitions. However, the competition enforcement framework creates a window for cartelists to defend *per se* prohibited conduct. If it can be illustrated that price-fixing was indirect and could contribute to some form of efficiency, the courts exercise the discretion to determine if the *per se* prohibition rule should be applied rigidly.²⁵⁹ It has been argued that this approach does not deter from the overall objective of identifying cartel activity as “hard-core.”²⁶⁰

²⁵⁵ Werden op cit (n181) at 20.

²⁵⁶ s1 of the Sherman Act.

²⁵⁷ Gerald F. Masoudi “Cartel Enforcement in the United States and Beyond” (2007)) Presented at the Cartel Offence Budapest, Hungary, available at <http://www.justice.gov/atr/public/speeches/221868.htm>, accessed on 29 September 2013.

²⁵⁸ Ibid.

²⁵⁹ Elanor M Fox ‘US and EU Competition Law: A Comparison’ (1997) *In Global Competition Policy* 339 at 342.

²⁶⁰ Ibid.

5.2.3 Effectiveness

The US has been highly successful in prosecuting cartelists. The Antitrust Division managed to win 82 criminal cartel cases out of the 58 which were filed in 2012. 45 individuals were sentenced to a total of 33,603 days of imprisonment.²⁶¹ There has been a marked increase in enforcement in comparison to 2003 where only 19 cases out of the 23 filed were won and 15 individuals were sentenced to 9,341 days of imprisonment.²⁶²

The effectiveness of the Antitrust Division has been centred on a series of developments which have expanded the reach of the division. First, the investigatory powers of the division were amended to allow wiretaps to be conducted during criminal investigations subject to pre-approval.²⁶³ The developments are an indication that the United States government equates cartel activity with other severe economic crimes.²⁶⁴ Secondly, the Antitrust Division has removed the no-jail deal, a tool used to lure defendants to co-operate or to confess to their cartel activity. The no-jail deal, as the term suggests, is an agreement between the Antitrust Division and the defendants which guarantees no imprisonment in exchange for their full co-operation during the investigation.²⁶⁵ The Antitrust Division has now decided that once a defendant is found guilty of hard-core cartel activity, they will be subject to imprisonment.²⁶⁶

The decision to withdraw the no-jail option is once again indicative that cartel activity is severe enough to warrant imprisonment. Although the withdrawal of the no-jail option could also be viewed as a disincentive for cartelists to make use of the amnesty policy (the equivalent to SA's leniency policy), the successes of the Antitrust Division thwart this premise. Lastly, the amnesty policy/leniency policy which is globally regarded as the most effective tool for enforcement creates an incentive for cartelists to come forward.

The reinforcing nature of cartel enforcement in the United States thus compliments the Division's efforts. Most importantly, the regulatory framework enables civil and criminal prosecutions to run simultaneously. This is also owed to

²⁶¹ Antitrust Division, Workload Statistics FY 2003 -2012 available at <http://www.justice.gov/atr/public/workload-statistics.html> accessed on 29 August 2013.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

the extensive staff it has within the Antitrust Division and the FTC.²⁶⁷ In addition, the antitrust authorities are able to focus their efforts on hard-core cartel activity.²⁶⁸ The localisation of resources has resulted in two key consequences: it enables companies to easily comply with competition regulations by being able to delineate which conduct is prohibited and it aids in the preservation of resources.²⁶⁹ The United States also has made use of its settlement process which has been a major contributing factor in successful prosecutions.²⁷⁰

The only similarities that exist with the South African competition framework is the leniency policy which maintains the same carrot and stick approach. The only exception is that immunity is offered from both civil and criminal prosecutions in the United States. What South African competition authorities can draw from the regulatory framework in the United States is the fortification of the Antitrust Division through policy. Secondly, criminal prosecutions remain within the jurisdiction of the competition authorities. The overall framework places emphasis on ensuring the efficacy of the leniency policy as a significant tool in cartel enforcement.

5.3 THE CARTEL OFFENCE IN SOUTH AFRICA

The cartel offence in South Africa seeks to bring together two differing institutions: the Commission which is strictly an economic enforcement institution as per the Competition Act and the NPA which is a criminal enforcement institution guided by its own policy directives. Section 73A has created a relationship between the Commission and the NPA. Section 73A has created an overlap between the powers and duties of NPA and the Commission. In addition, it has raised some constitutional concerns and called into question the suitability of the cartel offence within the competition framework in South Africa. These complexities will be canvassed fully below.

²⁶⁷ Fox op cit (n259) at 342.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Stephan op cit (n214) at 26.

5.3.1 Section 73A Provisions and Complexities

5.3.1.1 The Burden of Proof that needs to be met in s73A

Section 73A introduces a specific threshold that needs to be met by the NPA in order to get a conviction. The NPA needs to prove the following elements:

- (i) A person while being a director of a firm or while engaged in a position of management authority within that firm:
- (ii) ‘caused the firm to engage in a prohibited practice in terms of s 4(1)(b); or
- (iii) knowingly acquiesced²⁷¹ in the firm engaging in a prohibited practice in terms of section 4(1)(b).

The provision requires the NPA to establish criminal liability as a result of the director/management authority failing to meet their fiduciary duties.²⁷² Therefore, the NPA must establish a negative duty.²⁷³ The first element requires the NPA to establish that either a director or an individual in management authority, engaged in prohibited conduct. Identifying an individual who is in management authority may create some uncertainties.²⁷⁴ The substantive evidence illustrating that an individual is in management authority is similar to that of a director and thus creating that distinction may prove difficult.²⁷⁵

The second element, requires the NPA to prove the element of causation by illustrating that the individual was the causal factor in the violation of s4(1)(b).²⁷⁶ It can be assumed that the parameters of the element of causation found within criminal law will apply.²⁷⁷ Causation is not clearly defined and as a result creates uncertainty as to what evidentiary burden the NPA would have to overcome. Would evidence of the director/management authorities’ participation in meetings constitute causation or would more tangible evidence be required to establish causation?²⁷⁸ Would evidence of indirect causation of the anti-competitive conduct implicate an individual? These are a few questions the courts will have to grapple with.

²⁷¹ s73A(2) defines knowingly acquiesced as ‘having acquiesced while having actual knowledge of the relevant conduct by the firm.’

²⁷² Louise Jordaan, Phumudzo S Munyai ‘The Constitutional implications of the new section 73A of the competition act 89 of 1998’ (2011) 23 *SA Mercantile Law Journal* 197 at 206.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Kelly op cit (n2) at 330.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

The third element requires the NPA to establish that the director/management authority had knowingly agreed and had actual knowledge of the firm violating s4(1)(b). Once again there is a lack of clarity as to the evidentiary burden the NPA would have to overcome. An interpretation of the provision suggests that a director/management authorities' must have formally agreed and had full knowledge of the prohibited conduct.²⁷⁹ The formulation of s73A seems to be too narrow and creates a high evidentiary burden to be met by the NPA. The provision thus creates a window for a defence by the director/management authority to dispute their actual knowledge and acquiescence of cartel conduct.²⁸⁰ Without any tangible evidence, the NPA would fail to establish the burden of proof. The formulation of the offence is thus radically different from that of the United Kingdom and the United States.

5.3.1.2 Dual Proceedings between the Competition Commission and the National Prosecuting Authority

The Competition Commission is the sole authority responsible for cartel enforcement in South Africa. Section 73A seeks to give sole jurisdiction to the NPA to criminally prosecute those guilty of violating s73A. The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. Section 179²⁸¹ provides the general framework within which the NPA operates. Section 21(1)(b) of the National Prosecuting Authority Amendment Act²⁸² empowers the NPA to issue policy directives in accordance with s179 of the Constitution. The policy directives are exercised within the bounds of the policy provided in the National Prosecuting Authority Amendment Act and are independent from the Commission.²⁸³

The implications of s73A(4) is a dual process that has aptly been described as “proceedings [which are] bound to end up in tears. And it is tears for those who have

²⁷⁹ Ibid.

²⁸⁰ Kelly op cit (n2) at 331.

²⁸¹ Section 179 of the Constitution provides that:

(1) ‘There is a single national prosecuting in the Republic, structured in terms of an Act of Parliament, and consisting of –

(a) A National director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

²⁸² National Prosecuting Authority Amendment Act 61 of 2000.

²⁸³ s21(1).

to prosecute the cartel and possibly joy for the cartel and those involved in it.”²⁸⁴ The “tears” are a consequence of the duplicity of the process which creates technical complexities. One of the solutions proposed by the Commission was to have trials running concurrently; one before the civil courts and the other before the criminal courts, to alleviate the possible overlap between civil and criminal proceedings.²⁸⁵ However, this may result in the courts arriving at two differing conclusions.²⁸⁶ There is no guarantee that a successful civil prosecution will automatically result in a criminal conviction. Thus, the dual proceedings introduce a burden on prosecuting authorities.

The NPA is not a very efficient institution and is at the moment overwhelmed and under-resourced. The National Prosecuting Authority’s Annual Performance Plan of 2013/2014 indicated a decrease in the convictions of complex commercial crimes as tabulated below:

Figure A:

Financial Years	Number of Convictions
2008/2009	1, 188
2009/2010	960
2010/2011	742
2011/2012	754

The decrease in performance indicates the lack of proficiency in prosecuting complex economic crimes. Therefore, a parallel process is bound to contribute to the existing inefficiencies within the NPA.

In the United Kingdom the OFT and the SFO(both statutory bodies) work jointly in cartel criminal prosecutions.²⁸⁷ The OFT may launch an investigation if ‘there are reasonable grounds for suspecting that an offence under section 188 has been committed.’²⁸⁸ If it is shown that a criminal investigation is likely to ensue, the OFT may forward the case to the SFO or continue with their investigation in co-operation

²⁸⁴ Tsholofelo Letsike ‘The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?’ Presented at Competition Commission, Competition Tribunal, Mandela Institute & University of Johannesburg Seventh Annual Competition Law, Economics & Policy Conference, Johannesburg , 5 September at 12, available at <http://www.compcom.co.za/seventh-annual-conference-on-competition-law-economics-policy/>, accessed on 29 September 2013.

²⁸⁵ Lewis op cit (n172) at 228.

²⁸⁶ Ibid.

²⁸⁷ Letsike op cit (n284) at 12.

²⁸⁸ s192 of the Enterprise Act.

with the SFO.²⁸⁹ In the United States, this issue has been alleviated by giving sole jurisdiction for federal criminal cartel prosecutions to the DOJ. The FTC has sole jurisdiction for federal civil cartel prosecutions as mentioned above. Both institutions have ‘coextensive jurisdiction’ even though their policies are not always harmonious.²⁹⁰ Its success in using dual processes is likely owed to the extensive staff, resources, broad investigative powers and a highly specialised and skilled enforcement agency.²⁹¹

There was a proposition that cartel prosecutions in their entirety should be entrusted to the NPA.²⁹² However, this approach was applied in the old Competition framework and it did not result in any cartel prosecutions and is likely to be a fruitless exercise within the current competition framework.²⁹³ Therefore, in the South African context, to achieve what the United States has managed to achieve, would require the creation of a highly skilled enforcement agency and policies in line with said objectives.

5.3.1.3 Undercutting the leniency policy

The leniency policy is a highly effective plea-bargaining mechanism that has resulted in successful enforcement against cartels.²⁹⁴ The Commission in 2011/2012 financial year received approximately 244 leniency applications in comparison to the 33 it had received in the 2010/2011 financial year.²⁹⁵ In early 2013, the Commission made use of its fast-track settlement process that incentivises firms to admit to anti-competitive activity by offering an expeditious resolution of complaints, minimising legal costs and lesser penalties than those they were likely to receive in court proceedings.²⁹⁶ Twenty-one firms responded to the Commission’s offer of early settlement and the Commission uncovered three hundred instances of bid rigging as a result thereof.²⁹⁷ The Commission managed to settle with 15 construction firms for

²⁸⁹ Morgan op cit n(217) at 70.

²⁹⁰ Fox op cit (n259) at 341.

²⁹¹ Masoudi op cit (n257).

²⁹² Lewis op cit (n172) at 228.

²⁹³ Ibid.

²⁹⁴ Ibid at 227.

²⁹⁵ Competition Commission ‘Competition Commission Annual Report 2011/2012’ available at <http://www.compcom.co.za/assets/Publications/Annual-Reports/COMPETITION-COMMISSION-AR11-12-LOW-RESWITH-HYPERLINKS.pdf>, accessed 26 February 2013.

²⁹⁶ Ibid.

²⁹⁷ Media Release, Competition Commission “Construction firms settle collusive tendering cases with R1.5 billion in penalties” 24 June 2013 available at

collusive tendering.²⁹⁸ The figures are therefore indicative of the effectiveness of the leniency policy as an incentive for cartelists to confess to their conduct.

As mentioned above, the NPA will maintain exclusive jurisdiction in determining which individuals are prosecuted. Section 73A (4) only allows the Commission to make submissions to the NPA for leniency of deserving applicants.²⁹⁹ The submissions are only of persuasive value and do not guarantee immunity from criminal prosecution. This effectively means that that leniency policy will not be extended to criminal prosecutions and will only offer immunity from civil prosecutions.

Generally, the cost of being prosecuted for cartel activity does not outweigh the benefits derived from cartel activity due to under-deterrent administrative penalties.³⁰⁰ Consequentially, the leniency policy offers cartelists an opportunity to maximise their benefits by reducing the cost of being part of a cartel. The process is relatively transparent and cartelists are aware of the existing incentive the leniency policy offers. The cartel offence removes the transparency that the leniency policy provides by granting the NPA with the discretion to decide who deserves leniency. As an applicant it is a gamble to make use of the leniency policy because immunity from criminal liability is not guaranteed.

The OFT has been able to maintain the efficacy of the leniency policy by enabling an individual to obtain immunity from criminal prosecution although decisions by the European Commission may impact this. The DOJ exercises jurisdiction over all cartel prosecutions and also offers immunity from criminal prosecutions. One wonders why the South African authorities do not follow suit if they intend on making the cartel offence part of the competition legal framework. Perhaps if there was more cohesiveness between competition authorities and other anti-corruption agencies the cartel offence would be viable. Until this issue is resolved, it is highly unlikely that directors/executives will be willing to make use of the leniency policy if it would result in imprisonment.³⁰¹ As a result the leniency policy will become an inefficient incentive scheme.

<http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Construction-Fast-Track-Settlement-Process-Media-Release.pdf>, accessed 29 September 2013.

²⁹⁸ Media Release *supra* (n297).

²⁹⁹ Jordaan & Munyai *op cit* (n272) at 201.

³⁰⁰ Refer to Chapter 4 discussion on the economic deterrence theory.

³⁰¹ Letsike *op cit* (n284) at 6.

5.3.1.4 Possible constitutional issues

There have been several constitutional issues that have been raised with regard to s73A and they are discussed below.

(i) The Reverse onus

Section 73A(5) enables admissions obtained through consent orders to be used as *prima facie* evidence of activity falling within the scope of s4(1)(b). It has been argued that s73(A)(5) creates a reverse onus.³⁰² The implications of a reverse onus are that an individual's constitutional right to a fair trial,³⁰³ which includes the right to be presumed innocent,³⁰⁴ would be infringed. The burden of persuading the courts of the accused's guilt should fall entirely on the state.³⁰⁵ However, whether s73(A)(5) is unconstitutional, would be dependent on whether it creates a 'true reverse onus [or an] evidentiary burden shift.'³⁰⁶ The courts have vehemently been opposed to the creation of a true reverse onus in statutory provisions especially where an individual could face imprisonment.³⁰⁷ However, if the reverse onus results in an evidentiary burden shift, then it must be determined whether the limitation of the accused's right is constitutionally justifiable.³⁰⁸ The two-stage approach provides a framework within which one can determine whether the reverse onus is unconstitutional and is as follows:

- a. 'First, does the provision violate the presumption of innocence and the requirement that the accused's guilt be proved beyond reasonable doubt? If it can be illustrated that the provision can result in the accused being convicted without any evidence, then it infringes on the accused's right to be presumed innocent.'³⁰⁹
- b. Secondly, is it a justifiable limitation in terms of section 36(1) of the Constitution?'³¹⁰ The limitations clause requires the courts to consider whether 'the limitation is reasonable and justifiable within an open and

³⁰² Kelly op cit (n2) at 331.

³⁰³ s35(3) of the Constitution of the Republic of South Africa, 1996.

³⁰⁴ Ibid.

³⁰⁵ *S v Zuma* 1995 (1)SACR 568 (CC) para 25.

³⁰⁶ Letsike op cit (n284) at 9.

³⁰⁷ Kelly op cit (n2) at 331.

³⁰⁸ Letsike op cit (n284) at 10.

³⁰⁹ Ibid.

³¹⁰ Ibid.

democratic society based on human dignity, equality and freedom, taking into account all relevant factors;’

From reading the two-stage approach, there are two arguments that can be presented for and against s73A(5). First, s73A(5) is unconstitutional because it may result in the accused being convicted without any evidence being presented. This is because their guilt is presumed through the consent orders. A limitation of that nature would be unjustifiable because the existing reverse onus was envisioned only for civil prosecutions in the Competition Tribunal and not the criminal courts.³¹¹ In addition, the accused may not have been privy to the proceedings in the Tribunal or the Competition Appeal Court and thus not have been given an opportunity to defend themselves.³¹² As a result the limitation is clearly unreasonable.

Secondly, s73A(5) only seeks to prevent a duplication of processes. The Commission has already established that s4(1)(b) has been infringed and the NPA is required to illustrate that the individual ‘[caused or permitted] a firm to engage in a prohibited practice in terms of s4(1)(b);³¹³ or knowingly acquiesced in the firm engaging in a prohibited practice in terms of s4(1)(b).’³¹⁴ There is no reverse onus on the accused because the provision does not shift the evidentiary burden. The term “*prima facie*” requires the accused to provide evidence to the contrary of a presumed fact.³¹⁵ It merely eliminates the duplication of processes.

This is a contentious provision which will undoubtedly be left for the courts to decide. Nonetheless, if the constitutional issues were to be resolved, it would not address the vulnerable position of the leniency policy, the principal concern raised by the Commission.

(ii) Self-Incrimination

The wording of s73 creates the possibility that information volunteered by a cartel member in their leniency application or consent order, may be used to incriminate them in subsequent criminal proceedings. Section 35(3)(j) of the Constitution protects individuals against self-incrimination. In light of s35(3)(j), one has to

³¹¹ Ibid.

³¹² Ibid.

³¹³ s73A(1)(a).

³¹⁴ s73A(1)(b).

³¹⁵ *Scagul v AG Western Cape 1996* (11) BCLR 1543 (CC) para 11.

determine whether the NPA would be at liberty to use incriminating evidence obtained through competition civil proceedings in criminal proceedings.

A similar question was posed with regard to s417(2) of the Companies Act.³¹⁶ The provision in effect compelled individuals to answer incriminating questions during an inquiry. The provision was later declared unconstitutional in *Ferreira v Levin NO*³¹⁷ because it allowed evidence obtained through an inquiry to be used in criminal proceedings against the examinee. The decision protected the examinee's from self-incrimination.

In a competition context, a carteliser who approaches the Commission and volunteers incriminating information may find themselves in the dock at their own hand. This context is starkly different from the one formulated in the Companies Act because the carteliser is not compelled to provide the information. However, if one were to rely strictly on the finding provided in *Ferreira v Levin*, then it would be unconstitutional to allow the evidence proffered by the carteliser to be used in criminal proceedings against them regardless of the context in which the information was divulged. Therefore, it is probable that s73A (5) would not meet constitutional muster on the ground that it results in the self-incrimination.

5.4 Does the cartel offence have a place in South African competition law?

The question we are thus faced with is whether the cartel offence has a place within South African competition law. From a *prima facie* perspective, one can answer that in the affirmative. As illustrated through the analysis of the frameworks in the United States and the United Kingdom, it is plausible to have a cartel offence and it can be an effective deterrent. However, as indicated above there are some clear difficulties in the typography of s73A. The dual administrative process envisioned between the Commission and the NPA is unclear and poses the greatest problem. As a result of the jurisdictional stronghold the NPA has over the criminal prosecution of cartels, the Commission is essentially removed from the process.

The question of the evidentiary shift has called into question the constitutionality of s73A(5) and perhaps could impede the prosecutorial process. Most importantly, the expertise of the NPA in handling competition issues is of

³¹⁶ The Companies Act 61 of 1973

³¹⁷ *Ferreira v Levin NO* 1996 (2) SA 621 (CC).

concern. If the “*prima facie* evidence rule” is eradicated it would be up to the NPA to essentially establish an infringement of s4(1)(b), an exercise which they are not adequately skilled to do. The Amendment is clearly problematic and as voiced by the Commission severely undermines the efficacy of the leniency policy. Even if the potential constitutional issues were to be ameliorated, the Commission’s most effective enforcement tool would be eroded. Thus, it calls into question if there would be a more efficient mechanism to create a deterrent effect without introducing a cartel offence.

In a recent development, the Directorate for Priority Crime Investigation (“the Hawks”) intends to hold directors/executives criminally liable for their involvement in the construction cartel.³¹⁸ The Prevention and Combating of Corrupt Activities Act³¹⁹ (“Corruption Act”), which creates a general offence of corruption and criminalises certain corrupt activities, and the Prevention of Organised Crime Act³²⁰ (“POCA”), which deals with racketeering activities, can be used to charge directors/executives who engage in price-fixing, market allocation and collusive tendering (bid-rigging).³²¹ Section 73A was tabled to fill the lacunae in the Corruption Act and POCA.³²² Criminal prosecutions may result in directors being charged with fraud and corruption, in addition to the criminal charges under the Competition Amendment Act. Consequentially, there is a possibility of criminal charges being brought against individuals through the Corruption Act, POCA and the Competition Amendment Act. Perhaps the competition framework would be better suited if existing legislation such as POCA catered for the cartel offence. It would prevent authorities prosecuting individuals in triplicate. The NPA and the courts are already overwhelmed and under resourced and this would be a more pragmatic approach.

³¹⁸ Ahmore Burger-Smidt, Maphanga Maseko ‘Lack of Compliance and Corporate Governance – provoking the revolving prison door’ 8 May 2013, available at <http://www.polity.org.za/article/lack-of-compliance-and-corporate-governance-provoking-the-revolving-prison-door-2013-05-08>, accessed on 23 October 2013.

³¹⁹ The Prevention and Combating of Corrupt Activities Act 12 of 2004.

³²⁰ Prevention of Organised Crime Act 121 of 1998.

³²¹ Heather Irving “Construction probe highlights risks for cartel executives” (2013) available at <http://www.nortonrosefulbright.com/knowledge/publications/75238/construction-probe-highlights-risks-for-cartel-executives>, accessed 14 September 2013.

³²² ‘The Corruption Act criminalises the acceptance of any form of gratification for one’s own benefit or another’s benefit, or the giving to any other person any form of gratification which influences the conclusion of a contract, its execution or price-fixing. The definition which although widely interpreted, failed to address issues of geographical allocation of a market or the co-ordination of selling prices’ Ibid.

There have been various suggestions proffered by the Commission who as mentioned above oppose the introduction of a cartel offence in South Africa. There has also been a proposal of increasing existing criminal provisions found in Chapter 7 of the Competition Act.³²³ Section 74(1)(b) holds any person convicted of an offence in terms of the Competition Act ‘in any other case, to a fine not exceeding R2,000 or to imprisonment for a period not exceeding six months, or to both a fine and imprisonment.’³²⁴ The legislative framework would be better served by reinforcing these existing provisions by increasing the disincentive to commit Chapter 7 offences.³²⁵ An increase in administrative penalties to be in proportional with the number of years the cartel was active was also suggested due to the under-deterrent nature of administrative penalties.³²⁶ However, as explained in previous chapters, it would likely result in the liquidation of most firms. Dawn Raids³²⁷ have been of some benefit in allowing the Commission to secure evidence for prosecution but, they remain the only pre-emptive effort the Commission can apply.

It is my contention that too much focus has been placed on public competition enforcement and not enough on the private competition enforcement. This issue will be canvassed fully in the next chapter. The reality is that the business community and consumers are most affected by cartel activity. The business community is well-resourced and has the opportunity of playing an active role in shaping the competition framework.³²⁸ That being said, the cartel offence is premature and a new discourse needs to be encouraged regarding remedial enforcement for the Commission.

³²³ Lewis op cit (n172) at 229.

³²⁴ s74(1)(b).

³²⁵ Lewis op cit (n172) at 229.

³²⁶ Ibid at 230.

³²⁷ s48 of the Competition Act

³²⁸ Lewis op cit (n174) at 231.

CHAPTER 6 PRIVATE COMPETITION ENFORCEMENT

6.1 The benefits of private litigation in competition law

Follow-on damages litigation is a novel concept within the South African competition law arena and therefore no jurisprudence exists. Competition law has always been dominated by public competition enforcement while private competition enforcement has been inactive. The general goal of public competition enforcement is to maintain and foster a competition compliant culture. This is achieved through various means but the main goal is creating a significant deterrent effect; its central focus.³²⁹ Private competition enforcement, although personal in nature, provides the requisite assistance public competition enforcement requires.³³⁰

6.1.1 Private competition enforcement – a deterrent

Private competition enforcement provides a deterrent in two ways: first, it incentivises consumers and competitors to pursue private competition enforcement due to the personal rewards they stand to gain.³³¹ In jurisdictions such as the United States where punitive and treble damages are available, consumers and competitors have even more to gain from a successful private action. Secondly, firms risk paying significantly high damages to consumers or competitors or both.³³² This will alter the cost/benefit analysis conducted by cartels and increase the cost of partaking in cartel activity exponentially. Unlike administrative penalties where there is a 10% cap, when damages are awarded they are quantified in accordance to the harm or loss suffered. With the advent of class actions in South African competition law, cartelists now risk having to pay damages to a class of litigants which could mean millions of rands. The potential disincentive that individual litigation could present is thus remedied by collective action.

In other jurisdictions such as the United States, follow-on damages litigation has played a pivotal role in not only empowering consumers and competitors but also in competition enforcement.³³³ Section 4 of the Clayton Act provides that “any person who shall be injured in his business or property by reason of anything

³²⁹ Patricia Hahn Rosochowicz ‘Deterrence and the relationship between public and private enforcement of competition law’ 9 July 2003 at 1, available at <http://acle.uva.nl/events/competition--regulation-meetings/working-papers-cr-meeting-2005.html>, accessed on 23 October 2013.

³³⁰ Ibid.

³³¹ Ibid at 5.

³³² Ibid.

forbidden in the antitrust laws may sue ... and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.” A recent study on the deterrent effect of private competition enforcement illustrated that private enforcement was a significant and positive asset in assisting the DOJ in cartel enforcement.³³⁴ The study which entailed an assessment of private enforcement cases conducted by the DOJ from 1990 to 2007 revealed that private cartel enforcement has a superseding deterrent effect than the DOJ’s own antitrust enforcement program.³³⁵ The study was prompted by comments such as those made by the FTC’s Commissioner J Thomas Rosch who stated that “treble damage class action cases are almost as scandalous as the price-fixing cartels that are generally at issue... [the] plaintiffs’ lawyers . . . stand to win almost regardless of the merits of the case.”³³⁶

The study assessed forty private litigation cases which provided three times the deterrence that criminal antitrust cases provided.³³⁷ The forty cases resulted in a recovery of up to \$196billion.³³⁸ Twenty-five out of the forty cases were decided through actual litigation based on the finding that firms were guilty of *per se* prohibited conduct.³³⁹ This is in comparison to the \$6.75billion recovered from the DOJ’s criminal cases during the same time period.³⁴⁰ The figures arrived at above exclude additional factors (the value of products, discounts, services and coupons) which ‘formed part of the relief and which would have increased the deterrent value of private antitrust litigation.’³⁴¹ The results from the study revealed that 16 out of 40 cases were instigated by private entities while 10 out of 40 of the cases were follow-on damages litigation.³⁴²

Private enforcement has the advantage of empowering consumers and competitors to be able to claim damages for the harm and loss suffered at the hand of anti-competitive behaviour. Therefore, follow-on damages litigation is a mechanism

³³⁴ Robert H Lande, Joshua P Davis, ‘The extraordinary deterrence of private antitrust enforcement: A reply to Werden, Hammond and Barnett’ 58 *The Antitrust Bulletin* (2013) 173 at 180.

³³⁵ Robert H Lande, Joshua P Davis ‘Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws’ (2010) *University of Baltimore Legal Studies Paper*, 5.

³³⁶ *Ibid* at 2.

³³⁷ *Ibid* at 25.

³³⁸ *Ibid*.

³³⁹ *Ibid*.

³⁴⁰ *Ibid*.

³⁴¹ *Ibid* para 31.

³⁴² *Ibid*.

that can be utilised by consumers to protect their right to choose the best product at the most competitive price.

In 2005, Nationwide Airlines launched the first ever follow-on damages litigation case against South African Airways. South African Airways had employed an incentive scheme that would reward travel agents for redirecting customers from competing domestic airlines (primarily Nationwide Airlines and BA/Comair) to South African Airways.³⁴³ South African Airways was fined R45million for engaging in prohibited anti-competitive conduct.³⁴⁴ The action would have been the first of its kind for follow-on damages litigation and set an important precedent for civil claims within competition law. However, the parties settled out of court and the much awaited judgment was never delivered.

It was only a decade later when the judgment of *Children's Resources Centre v Pioneer Food*³⁴⁵ made follow-on damages litigation a real possibility for consumers and competitors. Therefore, the discussion that follows will provide a synopsis of the salient features of a claim for follow-on damages litigation and ultimately prove that private competition enforcement can provide the desired deterrent effect than the cartel offence.

6.2 The Legislative framework for follow-on damages litigation

6.2.1 Section 65 certificate

Section 65 of the Competition Act enables a claimant seeking damages or who has suffered loss as a result of anticompetitive conduct to commence civil action against a firm. Section 65(6)(b) specifically requires the claimant to 'file with the Registrar of Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court.' The notice certifies that the anticompetitive conduct is prohibited. The notice is conclusive proof of the prohibited conduct and is therefore binding on the civil courts.³⁴⁶ Therefore, it is beyond the scope of the civil courts to re-assess that a firm was found guilty of prohibited conduct. Once the s 65 certificate has been issued, the claimant may pursue follow-on damages litigation in a civil court.

³⁴³ Competition Tribunal Reasons and Orders, 2.

³⁴⁴ Competition Tribunal (2005) 'Reasons and Order: *The Competition Commission and South African Airways (Pty) Ltd*', Case Number 18/CR/Mar01, para 258.

³⁴⁵ *Children's Resources Centre v Pioneer Food* (50/50) [2012] ZASCA 182 (29 November 2012).

³⁴⁶ s65(6)(7).

The Competition Tribunal has sole jurisdiction to issue a s65 certificate. The scope of application of the certificate was questioned in *Premier Foods (Pty) Ltd v Manojm N.O*³⁴⁷ Following an application to determine the Competition Tribunal's jurisdiction to issue a section 65 certificate, the North Gauteng High Court in *Premier Foods (Pty) Ltd v Manojm NO*³⁴⁸ dismissed the claim that section 65 could not be applied to a firm who was not a formal party before the Tribunal. Premier Foods was granted leniency in terms of the leniency policy after confessing to its involvement in a bread cartel in the Western Cape.³⁴⁹ The application for certification was brought by the respondents who are seeking to institute civil action for damages, against the applicant, for its conduct (price-fixing among other things) as a member of the bread cartel.³⁵⁰ The applicant argued that the Competition Tribunal was prevented from making any order against it because it was never a formal party before the Tribunal.³⁵¹

The Court held that the language of s58 (1)(a)(v)³⁵² was not limited to a party formally cited before it. The s65 certification only acts as 'an affirmation or an attestation of a finding already made [and] such a finding is of the kind contemplated in s58(1)(a)(v).'³⁵³ Unlike the Antitrust Criminal Penalty Enhancement and Reform Act³⁵⁴ in the United States,³⁵⁵ leniency applicants in South Africa are not afforded protection from follow-on damages. Therefore, the judgment will enable consumers/competitors to pursue follow-on damages litigation against a firm which has been granted leniency. The overarching effect of the judgment is to deny any firms which were found guilty of prohibited anti-competitive conduct and granted leniency, an avenue to escape liability for any harm or loss they may have caused.

The judgment although praised by the applicants, raised a valuable critique regarding the leniency policy. As discussed before, one of the justifications provided

³⁴⁷ *Premier Foods (Pty) Ltd v Manojm NO*(38235/2012) [2013] ZAGPPHC 236 (2 August 2013).

³⁴⁸ Ibid.

³⁴⁹ *Premier Foods (Pty) Ltd v Manojm NO* supra (n347) para 9(b).

³⁵⁰ Ibid para 9 (h).

³⁵¹ Ibid para 11.

³⁵² Section 58(1)(a)(v) provides that the Competition Tribunal may: 'make an appropriate order in relation to a prohibited practice including- (v) declaring the conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65'

³⁵³ *Premier Foods (Pty) Ltd v Manojm NO* supra (n347) para 42.

³⁵⁴ Antitrust Criminal Penalty Enhancement and Reform Act of 2004. The Act provides a civil damages limitation by reducing leniency applicants' damages to single actual damages based on their own sales as opposed to treble damages with joint and several liability.

by the Commission for opposing the introduction of a cartel offence was the negative impact it would have on the leniency policy. The same could be said for follow-on damages. Cartelists may be forced to plunge back into secrecy due to the risk of having to bear the cost of paying maximum damages to claimants, as opposed to the 10% cap placed on administrative penalties. However, one could argue that leniency policy could remain effective, as argued in Chapter 4, if accesses to documents in leniency applications are kept strictly confidential. In some instances the information disclosed by a cartel list may contribute to subsequent claims against it. Therefore, it is essential that follow-on damages litigation policy is drafted with the leniency policy in mind. It must be remembered that unlike the United States, the South African courts only award single damages. Therefore, even if a court awards maximum damages to litigants one cannot deny them what is rightfully owed to them due to anticompetitive conduct. The exercise thus calls for a delicate balance to be struck between the leniency policy and what is owed to consumers/competitors.

6.2.2. Nature of a claim for follow-on damages

As mentioned above follow-on damages litigation is a novel experience for South African competition law. Consequentially, it was in *Children's Resources Centre v Pioneer Food*³⁵⁶ that the nature of a civil claim for follow-on damages was established. The consumers argued that their claim for damages was a delictual claim which derived from a breach of a statutory duty.³⁵⁷ Before delving into the approach taken by the courts, a brief background on the *Children's Resources Centre* judgment will be provided.

In 2006, Premier Foods, Tiger Consumer Brands ("Tiger Brands"), Pioneer Food and Foodcorp (hereinafter collectively referred to as "the bread cartel") were the subject of complaints received by the Competition Commission for price-fixing.³⁵⁸ The bread cartel had coordinated and fixed the price of bread produced and distributed to consumers within the Western Cape and on a national scale. The Commission's investigation revealed that the bread cartel had formally agreed to increase the bread price lists and placed restrictions on the discounts granted to distributors within the Western Cape.³⁵⁹ Retailers/ wholesalers (large national

³⁵⁶ *Children's Resources Centre v Pioneer Food* supra n345.

³⁵⁷ Ibid para 63.

³⁵⁸ Ibid para 2.

³⁵⁹ Ibid para 5.

supermarket chains, smaller general retailers and informal sellers) purchased bread at a fixed price and then made the bread available to consumers to purchase at a retail level.³⁶⁰ The prices the retailers purchased the bread from the bread cartel, was determined by the fixed discounts which derived from price lists which were negotiated at a national or regional level depending on the retailer.³⁶¹ At the same time, discounts offered to distributors in the Western Cape were also fixed.³⁶² The result was indirect price-fixing.

On a National scale, the bread cartel was also found to have contravened s4(1)(b)(i) and (ii) of the Competition Act.³⁶³ As will be discussed at a later stage, this may impact the quantum of harm the consumers experience and ultimately the quantum of damages the consumers and distributors may receive.

The Commission's investigation in the Western Cape prompted Premier Food to disclose their involvement in the bread cartel and was consequentially granted leniency.³⁶⁴ The information provided by Premier Food resulted in the Commission conducting an investigation on a National scale.³⁶⁵ Tiger Brands and Foodcorp settled with the Commission and paid an administrative penalty of R99 million and R45 million.³⁶⁶ Pioneer Foods was found guilty of prohibited anticompetitive conduct by the Competition Tribunal and was fined R196 million.³⁶⁷

In 2010, subsequent to the administrative penalties being imposed on the cartellists, a class of consumers and a class of distributors approached the Western Cape High Court to certify a class action. The consumers alleged that the respondents were in breach of a statutory duty.³⁶⁸ The statutory duty was born from the Competition Act which prohibits anticompetitive conduct of which the respondents were found guilty of.³⁶⁹ The distributors alleged that they had suffered financial loss due to the fixed discounts they received when they purchased the bread from the bread cartel and sought to claim damages.³⁷⁰ Both applications for

³⁶⁰ Ibid para 4.

³⁶¹ Ibid.

³⁶² Ibid para 5.

³⁶³ Ibid.

³⁶⁴ Ibid para 2.

³⁶⁵ Ibid para 3.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid para 63.

³⁶⁹ Ibid para 64.

³⁷⁰ *Mukaddam v Pioneer Food* (49/12) [2012] ZASCA 182 (29 November 2012), para 3.

certification by the consumers and the distributors were dismissed by the High Court and went on appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal once again dismissed the distributor's case but upheld the application made by the consumers. The consumers' application was remitted back to the High Court in order for the consumers to supplement their papers to pursue their claim for damages.³⁷¹ The distributors appealed their matter to the Constitutional Court who upheld their application for certification of an opt-in class action.³⁷² The matter was remitted back to the High Court for the distributors to supplement their affidavits to pursue their claim for damages.³⁷³

6.2.1.1 *Children's Resource Centre* – Section 65 interpretation

Section 65(6) creates a remedy by allowing 'a person who has suffered loss or damage as a result of a prohibited practice' to recover their loss. Consequentially, the consumers argued that a statutory legal duty exists, not to cause financial loss.³⁷⁴ As mentioned above, the consumers alleged that as a result of the prohibited anti-competitive conduct by the bread cartel they suffered harm and financial loss. They submitted that 'a breach of a statutory duty can give rise to a legal duty not to cause financial loss.'³⁷⁵ Therefore, because s65(6) creates a legal duty not to cause loss or damage, the consumers can make a delictual claim for loss. A delict is defined as 'an act of a person that in a wrongful and culpable way causes harm to another.'³⁷⁶ The law of delict seeks to govern the private law arena by creating legal remedies for patrimonial losses that occur between private individuals. It is inherent that a legal duty exists prior to one being able to make a claim for any loss suffered. To find liability in an individual or a firm one must satisfy the following five elements of a delict;³⁷⁷

- i. An act;
- ii. Wrongfulness;
- iii. Fault;
- iv. Causation; and
- v. Harm.

³⁷¹ *Children's Resource Centre* supra (n345) para 92.

³⁷² *Mukaddam v Pioneer Food* (CCT 131/12) [2013] ZACC 23.

³⁷³ *Mukaddam v Pioneer Food* supra (n370) para 56.

³⁷⁴ *Children's Resource Centre* supra (n 345) para 64.

³⁷⁵ Ibid.

³⁷⁶ J Neethling, JM Potgieter, JC Knobel *Law of Delict* 6ed (2010) 4.

³⁷⁷ Ibid.

Premier Food proffered a different interpretation of the formulation of s65. They submitted that s65 creates a claim for follow-on damages based on a finding that a firm engaged in prohibited anti-competitive conduct. Therefore, the claim submitted by the consumers was bad in law because any action taken in terms of s65 would exclude a delictual action.³⁷⁸ The interpretation submitted by Premier Foods would thus nullify any legal duty on the part of the firm that has been found guilty of prohibited anti-competitive conduct.

The court however, was not convinced by the alternative interpretation provided by Premier Foods but did not affirm which interpretation was more acceptable.³⁷⁹ Wallis JA contended that s65 does not necessarily state that one would not have an action nor does it state what requirements would have to be met.³⁸⁰ In addition, for one to make a claim based on the existence of a legal duty, without illustrating that there was a legal duty would undermine ‘the basic principles by which our law prevents liability for acts causing damage from being extended beyond acceptable limits.’³⁸¹

On the other hand, the reading of s65(6) may not require the courts to determine whether there was a delict. What the provision calls for is a mechanical process which only requires that the quantum of damages be assessed.³⁸² Due to the incomplete record and the novelty of the issues the court never provided a definitive position.³⁸³ The matter was remitted back to the High Court.³⁸⁴ The two interpretations provided by the consumers and Premier Food raised some complex issues which will affect the future of how a claim for follow-on damages litigation would be phrased. It will be left to the High Court to provide much needed clarity.

6.3 Class actions in competition law

6.3.1 Background

‘A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit.’³⁸⁵ Class actions provide a useful tool for consumer protection and have evolved

³⁷⁸ *Chilren’s Resource Centre* supra (n345) para 66.

³⁷⁹ *Chilren’s Resource Centre* supra (n345) para 68.

³⁸⁰ *Ibid* para 69.

³⁸¹ *Ibid* para 71.

³⁸² *Ibid* para 72.

³⁸³ *Ibid* para 73.

³⁸⁴ *Ibid* para 92.

³⁸⁵ *Ibid* para 16.

the role that civil litigation has played within South Africa.³⁸⁶ Prior to the application of class actions, civil litigation could not cater for the civil wrongs committed by conglomerates against consumers. ‘The collective interests [could] only be protected adequately by collective remedies.’³⁸⁷ Class actions (as mentioned) are not a novelty within South African law. The report published by the South African Law Commission in August 1998 which dealt specifically with the introduction of legislation recognising both class actions and public interest actions was meant to pave the way for a draft bill.³⁸⁸ However, the Bill never came to fruition. Therefore, it has been left to the courts to develop the common law in order to protect and enforce class actions.

Previously, class actions were only recognised in constitutional matters. It was in *Children’s Resources Centre* that class actions in non-constitutional matters were realised. Wallis JA noted that the to limit the use of class actions to rights infringed under the Bill of Rights and not any other would be irrational.³⁸⁹ As a result, in *Children’s Resource Centre* opt-out notice class actions for follow-on damages litigation were recognised.

An opt-out class action requires notice to be given to the members of the class, for them to determine whether they want to be excluded from the class action. Opt-out class actions are more inclusive because those who out of ignorance fail to notify the members will still be eligible to receive the remedy.³⁹⁰ Consequentially, opt-out class actions are generally preferred. The importance of providing notice is rooted in the binding nature of a judgment given for an opt-out class action. Whether the judgment is favourable or unfavourable will impact the nature of the class. Therefore, strict notification requirements need to be met to identify persons who do not wish to be part of the class and those who may wish to litigate in their own personal capacity.³⁹¹ The principle of *res judicata* would undoubtedly pose tremendous difficulty for the individuals who may have sought to litigate in their own personal capacity.

³⁸⁶ Wouter Le R De Vos ‘Reflections on the introduction of a class action in South Africa’ (1996) 4 TSAR 639 at 640.

³⁸⁷ Ibid.

³⁸⁸ South African Law Commission Discussion Paper (Project 88) ‘The Recognition of Class Actions and Public Interest Actions in South African Law’ (1998).

³⁸⁹ *Children’s Resource Centre* supra (n345) para 21.

³⁹⁰ De Vos op cit (n385) at 647.

³⁹¹ *Children’s Resource Centre* supra (n345) para 29.

The judgment which has developed what is a constitutionally recognised right³⁹², set important precedent for non-constitutional class actions. The judgment, a first for South African class action jurisprudence, laid down the procedural requirements for the certification of a prospective class action. Therefore, *Children's Resource Centre* opened the doorway for class actions to serve their purpose in the South African Economy where many are poor, uneducated and lack the means to individually institute claims against the 'goliaths' of commercial industries.

6.3.2 Class action certification process

It is a pre-requisite for a class action to be certified prior to the formation of a class action and prior to a summons being issued.³⁹³ The prime justification, among others, is to prevent nuisance suits or dilatory tactics. In jurisdictions such as the United States, a representative may commence a class action on behalf of a specific class.³⁹⁴ They make use of the ideological plaintiff; one who may act as a representative of a class but not necessarily be a member of the class.³⁹⁵ In *Children's Resource Centre* Wallis JA laid out the five requirements to be met in order for a class to be certified. The requirements derive from the report published by the South African Law Commission. The requirements are as follows:

- i. 'The definition of the class;
- ii. The identification of some common claim or issue that can be determined by way of a class action;
- iii. Some evidence of the existence of a valid cause of action;
- iv. The court being satisfied that the representative is suitable to represent the members of the class; and
- v. The court being satisfied that a class action is the most appropriate procedure to adopt for the adjudication of the underlying claims.'³⁹⁶

In *Mukaddam v Pioneer Food*³⁹⁷ the applicants sought the certification of an opt-in class action, which requires individuals who intend on becoming members of the class action to make their intentions expressly known.³⁹⁸ The applicant Mr Imraahn

³⁹² s38(c) of the Constitution of the Republic of South Africa, 1996.

³⁹³ *Children's Resource Centre* supra (n345) para 23.

³⁹⁴ De Vos op cit (n386) at 645.

³⁹⁵ South African Law Commission op cit (n388) para 5.4.1.

³⁹⁶ *Children's Resource Centre* supra (n345) para 23.

³⁹⁷ *Mukaddam v Pioneer Food* supra (n370).

³⁹⁸ De Vos op cit (n386) at 646.

Ismail Mukaddam distributed bread purchased from the Pioneer Food.³⁹⁹ His business was centred on selling bread to informal traders who subsequently sold the bread at a retail level, to consumers.⁴⁰⁰ The bread distributors launched an application in the High Court requesting certification of a class action against the bread cartel.⁴⁰¹ Their claim was dismissed by the High Court on the ground that there was no cause of action justifying the class action. On appeal, the Supreme Court of Appeal dismissed their claim on the ground that opt-in class actions were an exceptional procedural mechanism which was not suitable for their claim. The court held Rule 10 of the Uniform Rules of Court (which allows multiple claimants to join in a single action), was the more appropriate procedural mechanism.⁴⁰²

The distributors launched their final appeal at the Constitutional Court against the decisions in both the High Court and the Supreme Court of Appeal. The Constitutional Court rejected the reasoning provided by the Supreme Court of Appeal.⁴⁰³ It granted the certification of an opt-in class action for the distributors.⁴⁰⁴ The Constitutional Court based its decision on ensuring access to justice and most importantly creating accepted standards of procedure for certifying a class action.⁴⁰⁵ Nugent J stated in *Children's Resource Centre* that the claim presented by the consumers was potentially plausible.⁴⁰⁶ Jafta J in *Mukaddam* questioned why the same approach was not applied to the claim by the bread distributors particularly because the facts presented by the bread distributors and the consumers were related to the same complaint and both judgments in the Supreme Court of Appeal were delivered on the same day.⁴⁰⁷ Jafta J noted that rigidity in the application of the law is inconsistent with the interests of justice.⁴⁰⁸ The Constitutional Court upheld the appeal and the matter was remitted back to the High Court.⁴⁰⁹

³⁹⁹ Mukaddam supra (n369) para 3.

⁴⁰⁰ Ibid.

⁴⁰¹ *Mukaddam v Pioneer Food* supra (n370) para 8.

⁴⁰² Ibid para 24.

⁴⁰³ Ibid para 55.

⁴⁰⁴ Ibid.55.

⁴⁰⁵ Ibid para 28.

⁴⁰⁶ Ibid para 55.

⁴⁰⁷ Ibid para 52.

⁴⁰⁸ Ibid para 38.

⁴⁰⁹ Ibid para 56.

In other jurisdictions such as the United States and Canada the opt-in notice is unavailable.⁴¹⁰ The Ontario Commission failed to recognise opt-in notice class actions because they are like ‘[a] permissive joinder device’.⁴¹¹ The South African Law Commission favoured the inclusion of the opt-in procedure but did not discuss any potential overlap with Rule 10.⁴¹² Nugent JA asserted that opt-in notice class actions should only be applied in exceptional circumstances.⁴¹³ The assertion was based on the availability of the joinder device as an alternative procedural mechanism as found in Rule 10.⁴¹⁴ A joinder is defined as:

[A]ny number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.⁴¹⁵

There is a clear similarity between both procedural mechanisms. It seems that when the Constitutional Court approached this question they did not address how the courts would delineate between the use of Rule 10 and an opt-in class action. The “exceptional circumstances” reasoning was found to be inconsistent with the approach taken by the very same court and panel that provided the judgment for the *Children’s Resource Centre*. As Nugent JA clearly noted ‘claims that have sufficient commonality to qualify for a class action will necessarily qualify for a joint action under the rule and the converse applies.’⁴¹⁶ Although the delineation between Rule 10 and opt-in class actions is beyond the scope of this paper, it is evident that further development in this particular area of the law will be necessary for class actions to create more certainty. Perhaps the uncertainty created by the interpretation by Nugent JA, will be the catalyst for the statutory promulgation of class actions.

⁴¹⁰ Aidan Scallan, Michael Mbikiwa, Lizel Blignaut ‘Compensating for harm arising from anti-competitive conduct: Follow-on damages litigation, class actions, the relationship between public and private enforcement and models for quantifying harm’ Seventh Annual Competition Law, Economics and Policy Conference 5 & 6 September 2013 at 22, available at <http://www.compcom.co.za/seventh-annual-conference-on-competition-law-economics-policy/>, accessed on 23 October 2013.

⁴¹¹ De Vos op cit (n386) at 647.

⁴¹² South African Law Commission Report op cit (n388) para 5.10.19.

⁴¹³ *Mukaddam v Pioneer Food* supra (n370) para 14.

⁴¹⁴ Rule 10 of the Uniform Rules of Court.

⁴¹⁵ Ibid.

⁴¹⁶ *Mukaddam v Pioneer Food* supra (n370) para 13.

The judgments of *Mukaddam* and *Children's Resource Centre* have paved the way for class actions in South Africa. As discussed above, the process is not without its complexities and challenges. However, what the judgments have created is an avenue for private competition enforcement. Cartelists will not only be faced with the prospect of administrative penalties but they will also be subject to follow-on damages litigation at the behest of consumers/competitors.

6.5 Quantification of damages

The main goal when determining the quantum for damages is to ensure that the amount rewarded is justifiable and performs the requisite compensatory function. The amount awarded to the claimant/class has to be enough to compensate and not to unjustly enrich the defendant for their conduct. The South African Law Commission's report proposed that the aggregate assessment would be the correct methodology for determining the damages.⁴¹⁷ The report proposed that if an aggregate assessment is made, the court should indicate how the award is to be distributed.⁴¹⁸ There are three generally recognised forms for the quantification of damages. All methods are based on an estimation of damages and are not without their challenges. These will be canvassed below.

6.4.1 Comparative approach

(i) Before-and-After

This approach compares the prices during the cartel with the prices before and after the cartel.⁴¹⁹ The method is based on what is commonly referred to as the 'but-for' test. The assumption is that prices during the time the cartel was inactive will provide the best approximation of actual product/service prices.⁴²⁰ The method has been applied in many jurisdictions especially the United States where it has been utilised since the 1920's.⁴²¹

⁴¹⁷ South African Law Commission Report op cit (n388) para 5.13.5.

⁴¹⁸ Ibid.

⁴¹⁹ Organisation for Economic Co-operation and Development (OECD) (2011) Roundtable on the Quantification of Harm to Competition by National Courts and Competition Agencies – Note by the Delegation of the United States at 32.

⁴²⁰ Ibid.

⁴²¹ Cartel Damages Claims, The European Brand for Private Antitrust Enforcement, available at <http://www.carteldamageclaims.com/quantification%20methods.shtml>, accessed on 12 December 2013.

(ii) Yardstick

This approach draws a comparison between the market where the cartel was active and a similar product market, geographic market or a combination where the cartel was inactive.⁴²² For this method to be as accurate as possible, it requires the similar market to have similar ‘cost and demand structures’ to make it as evenly comparable with the collusive market.⁴²³

(iii) Multidimensional

This method of quantification combines the yardstick and before-and-after approaches. The approach “looks at the development of the relevant economic variable in the infringement market during a certain period (difference over time on the infringement market) and compares it to the development if the same variable during the same time period on an unaffected comparator market (difference over time on the non-infringement market).”⁴²⁴ This approach thus seeks to eliminate various shortcomings such as price fluctuations owed to external factors, which occur in the before-and-after or yardstick approaches.⁴²⁵

6.4.2 Profit-or-cost-based

(i) Profit-based

A profit-based approach requires an assessment between the profits received during the cartel and absent the cartel.⁴²⁶ The excess profit received can be calculated ‘by dividing the ‘but for’ profit by the production volumes during the cartel period.’⁴²⁷

(ii) Cost plus margin method

This method calculates the ‘but for’ price through determining the ‘cost per unit plus a predefined mark-up.’⁴²⁸ This quantification method would require the plaintiffs to have access to data such as the short-run or long-run marginal costs, overhead costs and

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ OECD op cit (n419) at 187.

⁴²⁵ Scallan et al op cit (n410) at 34.

⁴²⁶ Cartel Damages Claims op cit (n422).

⁴²⁷ Ibid.

⁴²⁸ Ibid.

investments.⁴²⁹ It is undoubtedly difficult for the plaintiffs to obtain this information and is therefore usually used in the regulation of monopolists.⁴³⁰

(iii) Critical loss analysis

This method requires one to '[estimate] the price elasticity of the cartelised product in question [to] forecast the break-even point where the increase in profits obtained via the increase in price would no longer outweigh the decrease in profits from lower demand.'⁴³¹ This method allows one to estimate the overcharge or increase in the price per unit.⁴³²

The various quantification methods above represent just a few of the options available to litigants to consider. There are some challenges as hinted above such as access to quality data, being able to successfully conduct comparative market assessments⁴³³ and the value chain which can pose difficulties in identifying the market where the anticompetitive conduct had an impact.⁴³⁴ No single method is perfect but they do represent possibilities that can be pursued by litigants.

6.5 Distribution method

The final consideration and stage for follow-on damages litigation, after the aggregation of damages, is the method of distribution of the damages awarded. The South African Law Commission's report suggested that the 'the court should give directions regarding distribution of the award to class members and may, where appropriate, require the defendant to distribute the damages directly to the class members.'⁴³⁵ In *Children's Resource Centre*, the consumers had suggested that the award given be placed into a trust to be used to the general benefit of bread consumers or it could be used for school feeding schemes.⁴³⁶ Wallis JA vehemently rejected the suggestions and provided that because the consumers had decided to sue in delict, they would have to be individually compensated for the loss they

⁴²⁹ Ibid.

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² OECD op cit (n 419) at 135.

⁴³³ Scallan et al op cit (n410) at 38.

⁴³⁴ *Children's Resource Centre* supra (n345) para 53.

⁴³⁵ South African Law Commission Report op cit (n388) para 5.13.5.

⁴³⁶ Ibid.

suffered.⁴³⁷ Any other form of distribution would be punitive in nature and thus against the fundamental tenants of a claim for damages.⁴³⁸ In addition it would exclude other members of the class from deciding how the award should be distributed.⁴³⁹ Wallis JA decided that it would be in the best interests of the class if the award was distributed to benefit the class in some way.⁴⁴⁰ Wallis JA encouraged creativity with the remedy such as price reductions on the products or coupons, a remedy used in the United States. However, the underlying compensatory function must be realised within the proposed remedy.⁴⁴¹

6.6 Conclusion

Private follow-on damages are a novel experience in South African competition law and have been sidelined until now. As discussed private competition enforcement has globally taken the fore in discussions and in jurisdictions such as the United States where it has been active for over a decade. They create a unique opportunity for consumers and competitors to be empowered to challenge cartellists while simultaneously offering supplementary assistance to public competition enforcement by creating a deterrent especially for recidivist behaviour.

The *Mukaddam* and *Children's Resource Centre* judgments have created ripples within competition law by paving the way for follow-on damages litigation and introduced class actions; a much needed procedural mechanism. Class actions will be able to cater for the indigent members of society and promote access to justice, a central tenant of the Constitution. Although, as was evident in the discussion, there are still some challenges to be addressed especially with regard to the nature of a claim and the extent of liability for follow-on damages. Nonetheless, there is clearly a legislative framework in existence that could make follow-on damages litigation part of the *naturalia* of competition enforcement in South Africa.

“[A] successful competition regime needs public resources to be supplemented or complemented by private resources through actions in the courts.”⁴⁴² Therefore, what should be encouraged is a marriage between public and

⁴³⁷ Ibid para 81.

⁴³⁸ Ibid para 84.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid para 97.

⁴⁴¹ Ibid.

⁴⁴² Kasturi Moodaliyar, James F Reardon, Sarah Theuerkauf ‘The Relationship between Public and Private Enforcement in Competition Law - A Comparative Analysis of South African, the European

private enforcement. Competition enforcement in general could serve to benefit from discourse between the private sector, the Department of Trade and Industry and the Commission to create guidelines regarding private competition enforcement.⁴⁴³

Union, and Swiss Law' Presented at Third Annual Competition Conference, 3 September 2009 at 9, available at <http://www.compcom.co.za/presentations-third-annual-competition-conference/>, accessed on 23 February 2013.

⁴⁴³ Ibid.

CHAPTER 7

CONCLUSION

Cartels, as discussed, are the most egregious form of anti-competitive conduct. Not only do they enable inefficient firms to continue in the market but they strip consumers of their right to choose products/services at competitive market prices. The South African market has been particularly vulnerable to the emergence of cartels due to its highly concentrated markets, homogenous goods and high entry level barriers for other companies. The cartel offence was thus introduced to provide an additional deterrent for public competition enforcement against cartels in South Africa.

Therefore, this dissertation sought to answer two fundamental questions:

- (i) Does the cartel offence have a place in South African competition law?
- (ii) If not, could private competition enforcement provide a more suitable alternative?

An examination of existing legislation, policies and measures put in place to address cartels revealed just how porous the regulatory framework has been. The Competition Commission is highly reliant on two mechanisms; the corporate leniency policy and monetary administrative penalties. The leniency policy has been a highly effective tool, more so with the introduction of the recent fast-track settlement process. On a global scale, the leniency policy has become an integral component of many competition frameworks and the root of success. Administrative penalties which form the core of South Africa's competition enforcement policy, have failed to provide the requisite deterrent effect. Consequentially, the cartel offence was formulated to fill the lacunae in public competition enforcement.

An assessment of the general theoretical literature underpinning the cartel offence formed the apex of examining whether it could be introduced into South African competition law. Three factors were identified as key components of introducing a cartel offence namely: the moral nexus of a crime; the traditional theories of punishment and the efficiency of the normative competition framework for the implementation of the cartel offence. Cartels are not morally condemned by the general populous due to their non-violent nature. Therefore they are not regarded as criminal activity. However, cartels display the same furtive and criminal-like conduct which can be equate with property crimes thereby making cartels inherently

criminal. Due to the economic component of cartel activity, the economic theory of deterrence could be used as the prime basis for justifying and developing a cartel offence in South Africa. The third and final factor, which was the most significant, tested whether the existing South African competition framework could afford to have the cartel offence as a supplementary mechanism. This question was considered with reference to the United States and the United Kingdom as jurisdictions which had already introduced the cartel offence.

The United States provided an exemplary framework because of its global reputation as a beacon of success. The United Kingdom which recently introduced the cartel offence provided an insightful look into the challenges and lessons South African could gain in developing the cartel offence. The comparative analysis illustrated that the cartel offence was positively complimented by competition frameworks in both jurisdictions despite the challenges faced.

The discussion led to the conclusion that the cartel offence had been prematurely introduced in South Africa. First, it was evident that the constitutional issues created by the cartel offence would vehemently be opposed by various institutions. Access to equal justice forms a core component of the South African legislative framework and any provisions which sought to undermine this principle have undeniably been rejected. Secondly, the lack of cohesion between the NPA and the Commission would create significant difficulties for civil competition enforcement. Section 73A which gives the NPA sole jurisdiction to prosecute cartels and reduces the Commission's submissions to mere pleas for leniency for certain cartelists. This will likely create tension between the NPA and the Commission and leave the system highly vulnerable.

Which leads to the third issue; the leniency policy would be severely undermined by this structure. Section 73A will result in cartelists not being inclined to make use of the leniency policy due to the possibility of being held criminally liable for their conduct. The leniency policy will be rendered as ineffective. It was suggested that coordination and cooperation between these two institutions could be achieved if the provision was amended to be in line with the objectives of the Commission. However, this remains to be seen.

It is at this juncture, that private competition enforcement can take the fore. As the study conducted in the United States provided, private competition enforcement will not only empower consumers, but provide the desired deterrent effect the cartel

offence was meant to achieve. The judgments of *Mukaddam*⁴⁴⁴ and *Children's Resource Centre*⁴⁴⁵ recognised follow-on damages litigation as a legal remedy and class actions as a procedural mechanism which can be utilised by aggrieved consumers and competitors. Not only do class actions provide procedural advantages but they eliminate the challenges which accompany individual litigation. This sort of progressive stance reinforces the notion that even the poorest in the country must feel the reach of the Competition Act. Individuals who under normal circumstances would have been excluded by the legal framework now have the opportunity to become part of what I regard as a revolutionary movement within competition law.

The scale of this discussion is therefore multifaceted. What this dissertation highlighted was that although the judgments of *Mukaddam* and *Children's Resource Centre* highlighted the challenges associated with developing a private competition framework, they placed a spotlight on uncertainties created by a lack of judicial guidance in developing private competition enforcement and the complexities it creates. In order to generate achievable policies and to encourage consumers and competitors to become active, there is a need for legislated class actions and a more developed common law. Ultimately, 'public and private enforcement have to work together; absent one or the other, the system of competition enforcement [will be] less efficient.'⁴⁴⁶

⁴⁴⁴ *Mukaddam v Pioneer Food* (49/12) [2012] ZASCA 182 (29 November 2012).

⁴⁴⁵ *Children's Resources Centre v Pioneer Food* (50/50) [2012] ZASCA 182 (29 November 2012).

⁴⁴⁶ Rosochowicz op cit (n329) at 16.

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